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Supreme Court, U.S.
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No. 08-

IN THE
Supreme Court of the United States

RICHARD ANTHONY, JR.,

Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fifth Circuit failed to follow *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003), and *Sonnier v. Johnson,* 161 F.l3d 941, 944 (5th Cir. 1998), in denying a certificate of appealability because, resolving doubt in favor of Petitioner, and based on a limited, threshold inquiry concerning the merits of Petitioner's claims he received ineffective assistance of counsel at trial when (1) his attorney failed to investigate mitigating issues of mental health and brain injury relevant to punishment and (2) argued a theory of self-defense which was unreasonable, theses claims are debatable among reasonable jurists and adequate to deserve encouragement to proceed further.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Richard Anthony, Jr.:	Petitioner
Nathaniel Quarterman:	Respondent

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard Anthony, Jr., respectfully requests that this Honorable Court grant this petition and issue a Writ of Certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit denying the issuance of a Certificate of Appealability on Petitioner's ineffective assistance of counsel claims.

CITATIONS TO THE OPINIONS AND RELEVANT ORDERS

The Order (App. at 1a) of the Court of Appeals denying the motion for reconsideration is not published. *Anthony v. Quarterman,* No. 07-50220 (5th Cir. June 9, 2008). The single-Judge Order (App. at 2a-4a) denying the request for a COA is not published. *Anthony v. Quarterman,* No. 07-50220 (5th Cir. April 10, 2008). The Order (App. at 5a-6a) of the United States District Court denying the request for a COA is not published. *Anthony v. Quarterman,* SA: 05-CV-477-WRF (W.D. Tex. May 23, 2007). The Order Adopting Magistrate Judge's Report and Recommendation (App. at 9a to 20a) of the United States District Court which dismissed Petitioner's Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 is not published. *Anthony v. Quarterman,* SA: 05-CV-477-WRF (W.D. Tex. Jan. 12, 2007). The Final Judgment (App. at 7a-8a) issued the same date is also not published. *Anthony v. Quarterman,* SA: 05-CV-477-WRF (W.D. Tex. Jan. 12, 2007). The Memorandum and Recommendation of the United States Magistrate

Judge (App. at 21a-44a) is not published. *Anthony v. Quarterman,* Civil No. SA-05-CA-477-RF, (W.D. Tex. Oct. 26, 2005). The decision (App. at 45a) of the Texas Court of Criminal Appeals denying Petitioner's Application for 11.07 Writ of Habeas Corpus "without written order" on the findings of fact and recommendations of the State Trial Court is not published. *Ex parte Anthony,* Application No. 61,441-01 (Tex. Crim. App. May 18, 2005). The Findings of Fact, Conclusions of Law and Recommendations on Application for Post-Conviction Relief Under Art. 11.07 (App. at 46a-53a) issued by the State Trial Court was not published. *Ex parte Anthony,* No. 2001CR4920-WI (144th Judicial District Court, Bexar County, Texas, Feb. 10, 2005). The affidavit of Petitioner's trial counsel is attached in the Appendix at pages 54a to 55a.

GROUNDS FOR JURISDICTION

The Order of the Court of Appeals denying Petitioner's Application for a COA issued on April 10, 2008. (App. at 2a-4a). The Order denying the motion for reconsideration issued on June 9, 2008. (App. at 1a). This Petition for Writ of Certiorari is due for filing on or before September 8, 2008. SUP. CT. R. 13. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have Assistance of Counsel for his defense.

28 U.S.C. § 2254(d)(1)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2253(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–
(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
(B) the final order in a proceeding under section 2255.
(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing as required by paragraph (2).

TEX. PENAL CODE § 9.31(b)(5)(A)

(b) The use of force against another is not justified:
(5) if the actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was:
(A) carrying a weapon in violation of Section 46.02.

STATEMENT OF THE CASE

In an indictment filed in September of 2001, Petitioner was charged with the murder of Samuel Brown. (FAP at 2).[1] Petitioner was only twenty years old at the time of the crime. *Id.* Importantly, when Petitioner was seventeen, he suffered a severe head injury after being struck twice by a baseball bat. (DCO at 2 n.2, App. at 10a n.2).[2]

The State alleged at trial that Petitioner had shot Mr. Brown in a parking lot in San Antonio, Texas, in a confrontation over a minor car accident. (FAP at 2). The State's evidence consisted of various witnesses to the crime who heard gunshots coming from a black Lincoln Navigator and then saw the driver of the vehicle pull out of the parking lot. *Id.* Two of the witnesses wrote down the license plate number of the Lincoln Navigator as it left the parking lot, and later provided this number to the police. *Id.* This license plate was then traced to the Anthony family residence, where Petitioner lived with his mother and father. These two witnesses also provided an in-court identification of Petitioner as the person who was driving the Lincoln Navigator. *Id.* at 2-3. Two other witnesses did not make a positive identification of

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[1] "FAP" is used to refer to Petitioner's First Amended Petition for Writ of Habeas corpus by a Person in State Custody, Docket No. 3. "Docket No. ____ " refers to the Docket Report for the United States District Court for the Western District of Texas.

[2] "DCO" is used to refer to the Federal District Court's Order Adopting Magistrate Judge's Report and Recommendation, Docket No. 19, attached hereto at App. 9a to 20a.

Petitioner, and one testified the driver was male, possibly Hispanic. *Id.* at 3.

At trial, Petitioner testified he was waiting at a traffic light in his black Lincoln Navigator when he was struck from behind by a maroon car.[3] (M&R at 9, App. at 28a). He stated that the car pulled around him and departed. *Id.*, App. at 28a. Petitioner testified he then followed the car into a parking lot. *Id.*, App. at 28a. The driver, Petitioner continued, exited the maroon car and approached Petitioner, asking why Petitioner was following him. *Id.*, App. at 28a. Petitioner testified that when he told Mr. Brown of the car damage, Mr. Brown made threatening comments and moved towards Petitioner with something in his hand, although Petitioner could not tell what it was. *Id.*, App. at 28a. Recalling that he had suffered the head injury before and that his doctor told him another blow could kill him, Petitioner panicked, grabbed a pistol from the glove compartment, and fired twice. (DCO at 2, App. at 10a). Petitioner testified he saw Mr. Brown "wince," and then Mr. Brown stopped coming toward him. (FAP at 4). Petitioner did not have a permit to carry the gun. (DCO at 2, App. at 10a). Petitioner testified he then fled to Mexico, disposed of the gun, and returned to San Antonio several days later. *Id.*, App. at 10a.

At trial, Petitioner's attorney sought an acquittal on the basis of self-defense. *Id.*, App. at 10a. He argued several times at closing argument that Petitioner followed the maroon car to exchange

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[3] "M&R" refers to the Memorandum and Recommendation, Docket No. 14, of the United States Magistrate Judge, attached hereto at App. 21a to 44a.

insurance information. (M&R at 13, App. at 32a). However, this argument came after the State had questioned Petitioner on cross-examination and Petitioner had admitted he followed Mr. Brown "seeking resolution to the accident[.]" (Petitioner's Objections to U.S. Magistrate Judge's Memorandum and Recommendation, Docket No. 18, at 6 & n.2) (citing Anthony testimony, p. 54). Specifically, the prosecutor asked Petitioner: "So you wanted to resolve the situation" and Petitioner responded: "I just–yeah, exact–about the–see what had taken place, why it had taken place." *Id.* (citing Anthony testimony, p. 52). Later, the prosecutor asked: "You were seeking resolution to the accident, correct?" and Petitioner responded: "Yes." *Id.* (citing Anthony testimony, p. 54).

After both sides rested, the jury was instructed that the use of force against another is not justified if the person claiming justification "sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was [unlawfully] carrying a weapon in violation of section 46.02 [of the Texas Penal Code]." (FAP at 5) (citing TEX. PENAL CODE § 9.31(b)(5)(A)). The prosecutor stressed this instruction in closing argument, stating that the jury must reject Petitioner's claim of self-defense. *Id.* Petitioner's trial counsel, in his closing argument, suggested to the jury that Petitioner's conduct could not be considered "going to seek an explanation" because his purpose in following Mr. Brown into the parking lot was to exchange insurance information. *Id.*

Petitioner's trial counsel had presented his entire general voir dire without ever mentioning the

exception, thereby failing to inform prospective jurors of, and to question them about, the defense of justification or the operation of the exception. (2 R.R. 66-95)[4]; see also (Petitioner's Objections to U.S. Magistrate Judge's Memorandum and Recommendation, Docket No. 18, p. 4). Trial counsel chose not to question most of the prospective jurors individually, but when he did ask individual questions, he failed to mention the § 9.31(b)(5)(A) exception. (2 R.R. 95-170); see also (Petitioner's Objections to U.S. Magistrate Judge's Memorandum and Recommendation, Docket No. 18, p. 4). However, both the prosecutor and the Trial Judge discussed the law of self-defense, and the exception, during voir dire. (M&R at 12, App. at 31a-32a), while Petitioner's counsel remained silent. (Petitioner's Objections to U.S. Magistrate Judge's Memorandum and Recommendation, Docket No. 18, pp. 4-5). Trial counsel later stated in an affidavit that:

> From my initial review of the facts until the time of trial, I approached Mr. Anthony's case as one of self-defense. At the time of Mr. Anthony's trial, I was aware of the provisions of the Tex. Penal Code 9.31, limiting the availability of a claim of self-defense when an unregistered handgun is involved in the use of force. I believed that if the jury believed Mr. Anthony when he said that he thought his life was in danger from

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[4] "__ R.R. __" refers to the volume and pages of the State Court Reporter's Record.

> the victim, Samuel Brown, they would acquit him of the charge of murder.

(App. at 54a).

After deliberating for approximately one hour, the jury returned with a verdict of guilty. (FAP at 5). The trial proceeded to punishment before the jury. *Id.*

At the punishment phase, the State called three witnesses relevant to this proceeding: (1) a Bexar County juvenile probation officer who had supervised Petitioner on juvenile probation; (2) an individual employed by the Bexar County District Attorney's Office at the time of trial, but who had worked previously at the Bexar County Juvenile Justice Academy, where Petitioner went to school while he was on probation; and (3) a registered nurse who worked at Charter Real Hospital in San Antonio where Petitioner had been admitted as a teenager for depression. *Id.* at 5-6. The first witness testified Petitioner performed well on probation, but did describe for the jury the drug charges which brought Petitioner to his office. *Id.* at 6. The second witness testified Petitioner generally performed well in school, and was a quiet student, but that on at least two occasions, he had seen Petitioner become enraged, to the point where Petitioner wanted to hurt someone, during minor confrontations with students. *Id.* The third witness testified regarding her conversations with Petitioner after he was admitted to the psychiatric hospital for depression. *Id.* She stated that Petitioner told her he was a member of a gang and that he had been in the car during "drive-by[]" shootings, and that he had been involved in robberies. *Id.*

Petitioner's trial counsel called three witnesses: Petitioner's parents and Petitioner himself. (FAP at 6). Petitioner's father and mother acknowledged Petitioner had emotional problems including a temper and propensity to fight with the family, but stated they exaggerated the problems. *Id.* Petitioner's father further testified he thought probation would be an appropriate punishment for his son, and that he would live with his parents in the event he did receive probation. *Id.* Mrs. Anthony testified that her son had a common law wife, who had since moved in with Petitioner's parents and given birth to Petitioner's child. *Id.* Petitioner himself testified that he had not actually participated in any drive-by shootings or robberies, but was aware other members of his group who had done so. *Id.*

Trial counsel acknowledged in an affidavit filed in the State Court habeas proceedings that he had in his possession medical records documenting Petitioner's previous head injury, but made no use of these records at the punishment phase of Petitioner's trial. (DCO at 9, App. at 18a). In his state post-conviction affidavit, trial counsel explained he made no attempt to investigate any possible mitigating evidence arising out of this serious head injury because he believed the evidence was relevant only to Petitioner's claim of self-defense, and he did not view the records as an indication of possible organic brain damage. *Id.* at 8-9, App. at 18a. The affidavit states:

> The records attached to this affidavit, from the Southwest Texas Methodist Hospital in San Antonio, Texas, are true and correct copies of records I collected in preparing for this case. I did not seek to

> have these records examined by a psychiatrist or psychologist or any other expert. To me, these records represented objective evidence of Mr. Anthony's reasonable belief that his life would be in danger if he were to suffer an additional head injury. My review of these records did not cause me to suspect that Mr. Anthony might suffer from a brain injury.

(App. at 54a).

Before the State Habeas Court, Petitioner submitted the affidavit of Dr. Cecil R. Reynolds, who examined Petitioner's medical records and determined that Petitioner more likely than not suffers residual organic brain damage as a result of the injury he sustained when he was seventeen. (M&R at 16, App. at 35a). According to Dr. Reynolds, among the many residual effects of such an injury are a lack of impulse control, a tendency towards aggression, and poor emotion regulation. *Id.*, App. at 35a. He stated that impulsivity and aggression can be controlled by medication. *Id.*, App. at 35a. Dr. Reynolds testified that a competent attorney should have retained an expert to evaluate the medical records. *Id.*, App. at 35a. He also stated he believes that the very existence of such an injury and the possibility of treatment mitigates Petitioner's culpability. *Id.* at 16-17, App. at 35a.

The jury was also instructed on the applicable parole laws, being told that Petitioner "will not become eligible for parole until the actual time served equals one-half of the period of incarceration imposed or 30

years, whichever is less, without any consideration of any good conduct time he may earn." (7 R.R. 147).

In closing, the prosecutor recommended the jury sentence Petitioner to no less then thirty years in prison. (FAP at 7). Petitioner's trial counsel asked the jury for probation. *Id.* After deliberating for approximately four and one half hours, the jury returned a verdict of fifty years. *Id.*

Petitioner appealed his conviction and sentence. The Court of Appeals for the Fourth Judicial District of Texas affirmed on March 12, 2003, and the Texas Court of Criminal Appeals denied his petition for discretionary review. (M&R at 2, App. at 11a). Following disposition of the direct appeal, Petitioner filed on December 7, 2004, a state habeas application under article 11.07 of the Texas Code of Criminal Procedure. *Id.*, App. at 11a. The Texas Court of Criminal Appeals denied the application on May 18, 2005. (App. at 45a).

Petitioner timely filed a petition for writ of habeas corpus in the Federal District Court pursuant to 28 U.S.C. § 2254 challenging his State Court conviction and sentence for murder. (DCO at 2-3, App. at 11a). He filed a First Amended Petition for Writ of Habeas Corpus on June 6, 2003. (Docket No. 3).

In this First Amended Petition, Petitioner alleged he received ineffective assistance of counsel at trial when his attorney pursued a theory of self-defense which was foreclosed as a matter of law. (DCO at 2-3, App. at 11a). Section 9.31 of the Texas Penal Code provides that "a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of

lawful force." TEX. PENAL CODE § 9.31(a). However, section 9.31(b)(5) limits self-defense by stating that "[t]he use of force against another is not justified . . . if the actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was [unlawfully carrying a weapon]. *Id.* § 9.31(b)(5). Petitioner asserted that, because trial counsel knew both that his client was unlawfully carrying the gun with which he killed Mr. Brown and that his client had followed Mr. Brown's vehicle, section 9.31(b)(5) of the Texas Penal Code precluded self-defense as a viable option. (DCO at 2-3, App. at 11a). Self-defense was further foreclosed at trial when Petitioner testified he followed Mr. Brown "seeking resolution of the accident." *Id.* at 7, App. at 16a. Thus, Petitioner argued the decision to follow a self-defense theory constituted ineffective assistance of counsel. *Id.*, App. at 16a.

Petitioner also argued he received ineffective assistance of counsel when his attorney failed to investigate mitigating issues of mental health and brain injury relevant to punishment. *Id.* at 2-3, App. at 11a. Specifically, counsel had Petitioner's medical charts, which explained that Petitioner had suffered a head injury, yet counsel failed to investigate whether this led to brain damage or other mitigating evidence. *Id.* at 8, App. at 17a.

The United States Magistrate Judge to whom the case was referred issued a written Memorandum and Recommendation recommending that the habeas writ be denied. (DCO at 3, App. at 11a); see also (M&R, App. at 21a-44a). The Magistrate Judge found Petitioner had failed to meet the standard of proof

required for the Court to grant habeas relief on his ineffective assistance of counsel claims. (DCO at 3, App. at 12a). Specifically, as set forth by the District Court, the Magistrate Judge found Petitioner's counsel's decision to argue self-defense was "entirely reasonable." *Id.* at 3, App. at 12a. The Magistrate Judge also found Petitioner's counsel "did not act unreasonably in failing to utilize brain damage as a mitigating factor in the punishment phase of trial." *Id.* at 3, App. at 12a.

Petitioner filed objections to the Magistrate Judge's Memorandum and Recommendations. (Docket No. 18). The Federal Court considered the objections, but adopted in full the Memorandum and Recommendation and denied all relief. (DCO at 4-10, App. at 13a-20a). Regarding counsel's failure to investigate Petitioner's head injury, the Federal District Court "admit[ted] this is a close call," but nonetheless declined to issue a certificate of appealability. *Id.* at 8, App. at 17a. Regarding Petitioner's claim that counsel relied on an unreasonable defense which could not be proven at trial, the District Court held that self-defense was not foreclosed. *Id.* at 7-8, App. at 17a. He determined that, because Texas law requires drivers to exchange insurance information after a traffic accident, the jury could have reasonably believed Petitioner approached Mr. Brown in order to exchange insurance information rather than discuss differences. *Id.* at 7, App. at 16a. Regarding Petitioner's statement at trial that he was "seeking resolution of the accident," the District Court concluded that "the exchange of insurance information is often the resolution of a traffic accident." *Id.*, App. at 16a.

Petitioner filed with the United States Court of Appeals for the Fifth Circuit his Petitioner-Appellant's Application for Certificate of Appealability seeking a COA to appeal the District Court's denial of his 28 U.S.C. § 2254 petition. A Member of the Panel denied the request for a COA on April 10, 2008. (App. at 2a-4a). Petitioner then filed a motion for reconsideration which was denied by a three-Judge Panel on June 9, 2008. (App. at 1a). It is from this Order denying reconsideration of the application for a COA from which Petitioner seeks a Writ of Certiorari.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Petitioner respectfully submits the United States Court of Appeals for the Fifth Circuit failed to follow *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003), and *Sonnier v. Johnson,* 161 F.3d 941, 944 (5th Cir. 1998), in denying a COA because, resolving doubt in favor of Petitioner, and based on a limited, threshold inquiry concerning the merits of Petitioner's claims that he received ineffective assistance of counsel at trial when (1) his attorney failed to investigate mitigating issues of mental health and brain injury relevant to punishment and (2) argued a theory of self-defense which was unreasonable, theses claims are debatable among reasonable jurists and adequate to deserve encouragement to proceed further.

A. The Standard Governing Ineffective Assistance of Counsel Claims

Petitioner's ineffective assistance of counsel claims were raised in Petitioner's state habeas petition. (M&R at 7, App. at 27a). The state habeas court made findings of fact and conclusions of law, and recommended relief be denied. (App. at 46a-53a). The Texas Court of Criminal Appeals denied the petition without written order based upon the trial court's findings. (App. at 45a).

A state prisoner may obtain relief with respect to claims adjudicated on the merits in state court as long as the adjudication (1) resulted in a decision which was contrary to, or involved an unreasonable application of, clearly established federal law, as announced by the United States Supreme Court, or (2) resulted in a decision which was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d). A decision is "contrary to" clearly established federal law when the State Court reaches a conclusion which is opposite to that reached by the United States Supreme Court on a question of law or if the State Court decides a case differently than the United States Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A decision "unreasonably applies" clearly established federal law when the State Court correctly identifies the governing legal principle, but misapplies this principle to the facts. *Id.* Thus, habeas relief can be granted if the correct legal principle was unreasonably applied by the State Courts to the facts of the petitioner's case. *Id.* at 413.

Effective assistance of counsel is a right guaranteed by the Sixth Amendment of the United States Constitution. U.S. CONST. amend. VI. To obtain habeas relief on his claims of ineffective assistance of counsel, the habeas applicant must demonstrate that his counsel was deficient and that this deficiency prejudiced his defense. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). In order to establish his counsel's performance was constitutionally deficient, the habeas applicant carries the burden of proof to show counsel's performance fell outside the range of reasonable professional assistance. *Id.* at 689-91. A habeas applicant must also show that counsel's deficient performance prejudiced the defense. *Id.* at 692. Specifically, the habeas applicant must prove counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Lockhart v. Fretwell,* 506 U.S. 364, 372 (1993).

B. The Legal Standard for Granting a COA

Petitioner must obtain a COA as a "jurisdictional prerequisite" to appealing the District Court's denial of habeas relief. *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003). A COA will be granted only if Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Tennard v. Dretke,* 542 U.S. 274, 282 (2004). Because the District Court rejected Petitioner's constitutional claims on the merits, Petitioner must show 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues

presented are adequate to deserve encouragement to proceed further.' *Miller-El,* 537 U.S. at 336 (citing *Slack v. McDaniel,* 529 U.S. 473, 484 (2000)). In making a COA determination, the Court conducts a "threshold inquiry" consisting of "an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. Finally, in the Fifth Circuit, any doubt as to whether a COA should issue must be resolved in favor of the petitioner. *Sonnier v. Johnson,* 161 F.3d 941, 944 (5th Cir. 1998) (citing *Whitehead v. Johnson,* 157 F.3d 384, 386 (5th Cir. 1998); *Fuller v. Johnson,* 114 F.3d 491, 495 (5th Cir.), *cert. denied,* 522 U.S. 963 (1997)). Petitioner respectfully submits that, resolving doubt in his favor, and based on a limited, threshold inquiry concerning the merits of his ineffective assistance of counsel claims, a COA is warranted because these claims are debatable among reasonable jurists and deserve encouragement to proceed further.

C. A COA Should Have Been Granted on Petitioner's Ineffective Assistance of Counsel Claims

1. The Reasons of United States Court of Appeals for the Fifth Circuit for Denying a COA

The Order of the United States Court of Appeals for the Fifth Circuit denying Petitioner's request for a COA provides in relevant part:

Anthony argues that the district court erred in denying his claim that counsel was ineffective for failing to investigate the injury to his head in September 1997 because it conceded that resolution of the issue was a "close call," because the affidavit submitted by counsel in the state habeas proceedings showed that counsel had information that should have prompted him to investigate Anthony's head injury, and because Anthony submitted an affidavit by a mental health expert stating that the information available to counsel should have prompted an investigation into Anthony's head injury. Anthony argues that the information concerning his head injury would have led the jury to impose a lesser sentence.

Anthony also argues that the district court erred in denying his claim that counsel was ineffective for pursing only a self-defense theory at trial. He argues that, based upon the facts of his case, that defense was not legally available to him and that his attorney should have presented a defense of mistaken identity. He claims that he was prejudiced by the self-defense theory because it required him to testify and his testimony elicited details of the crime that prejudiced him at the guilt and punishment phases of his trial.

> Anthony fails to show that reasonable jurists would debate the district court's denial of these claims. *See Slack,* 529 U.S. at 484. Anthony's motion for a COA is therefore denied.

(App. at 3a-4a).

2. Mental Health Issues Related to Punishment Mitigation

a. Resolving Doubt in Petitioner's Favor, the District Court's Admission of "a Close Call" Merits Granting a COA

Petitioner asserts that trial counsel was ineffective for failing to investigate Petitioner's head trauma and present this evidence at punishment. Although the Fifth Circuit interpreted Petitioner's argument to be a challenge to the District Court's actual denial of his claim, Petitioner intended to show that, resolving doubt in his favor, the District Court's finding of a "close call" means that the punishment mitigation issue is debatable among reasonable jurists and one which requires further review. *Sonnier,* 161 F.3d at 944.

As argued in Petitioner's original application for a COA:

> While the Federal District Court held that Mr. Anthony's "contention that counsel failed to investigate Petitioner's potentially-mitigating head injury . . . falls short of ineffective assistance of counsel, ... the Court admits that this is a close call." (DCO, p. 8) (emphasis

> added). While Mr. Anthony asserts he should prevail on the merits of his claim, this declaration by the District Court is the functional equivalent of a finding that the failure to investigate the issue is at least arguable among prudent Judges and/or is an issue which requires further proceedings. Therefore, the issue is at least "debatable among reasonable jurists." *Slack[v. McDaniel],* 529 U.S. [473,] [] 484 [(2000)]. Alternatively, the failure to investigate issue is "adequate to deserve encouragement to proceed further." *Miller-El [v. Cockrell],* 537 U.S. [322,] [] 336 [(2003)]. In light of the District Court's admission, Mr. Anthony respectfully submits he merits a COA on his argument that trial was ineffective for failing to investigate Mr. Anthony's head injury further.

(Petitioner-Appellant's Application for Certificate of Appealability, p. 18). Given the Fifth Circuit's finding of a "close call," and resolving doubt in his favor, Petitioner respectfully submits he is entitled to the issuance of a COA on this issue. *Sonnier,* 161 F.3d at 944.

b. The Evidence Supports the Granting of a COA on the Threshold Inquiry Concerning the Merits of this Claim

Presuming the admission of "a close call" does not in and of itself merit a COA, Petitioner contends that, resolving doubt in his favor and based on a

limited, threshold inquiry concerning the merits of this claim, the uncontested testimony of trial counsel and the mental health expert support a finding that this claim is debatable among reasonable jurists and adequate to proceed further. *Miller-El,* 537 U.S. at 336; *Sonnier,* 161 F.3d at 944.

Specifically, Petitioner submits trial counsel's affidavit shows he possessed sufficient information and knowledge at trial which would have caused a reasonable attorney to investigate further. Additionally, Petitioner submits such an investigation would have revealed crucial mitigating evidence which would have changed the outcome of the sentencing proceeding.

Importantly, the trial attorney had knowledge of undisputed facts which should have caused him to investigate further into Petitioner's mental and physical condition. As noted, Petitioner's trial counsel provided an affidavit which discussed these issues. (App. at 54a-55a). The attorney attached a copy of the medical records, which are extensive and close to forty pages in number, which establish Petitioner suffered a severe head injury as a result of a being beaten with a baseball bat. *Id.* at 54a. The records demonstrate extensive treatment was required and surgery was performed. *Id.* In the affidavit, trial counsel states:

> The records attached to this affidavit, from the Southwest Texas Methodist Hospital in San Antonio, Texas, are true and correct copies of records I collected in preparing for this case. I did not seek to have these records examined by a psychiatrist or psychologist or any other expert. To me, these records represented

> objective evidence of Mr. Anthony's reasonable belief that his life would be in danger if he were to suffer an additional head injury. My review of these records did not cause me to suspect that Mr. Anthony might suffer from a brain injury.

Id. In other words, despite the fact there was objective evidence of a substantial head injury, the attorney believed it was reasonable not to suspect that his client "might suffer from a brain injury." *Id.* Petitioner asserts, if a person has a head injury which required extensive medical treatment, including surgery, it follows that an investigation was in order to determine whether that injury had any effect on the brain. Under the circumstances, it is only reasonable to believe that an investigation for a brain injury or a resulting mental illness was in order.

The Federal District Court reasoned and held:

> While the Court acknowledges that a clear indication of a mitigating factor requires investigation, the Court does not believe that Petitioner's head injury is clearly mitigating. *See e.g., Rompella v. Beard,* 545 U.S. 374 (2005) (finding ineffective assistance of counsel when defense counsel failed to look at a file that the prosecution stated it would use at sentencing); *Wiggins v. Smith,* 539 U.S. 510, 512 (2003) (finding ineffective assistance of counsel when counsel did not investigate when defendant had no criminal background, extensive medical and psychiatric files, and could not

> remember the criminal incident). Petitioner's counsel's affidavit indicates that while he looked at the medical records and acknowledged that Petitioner had suffered the head injury, counsel did not believe that the head injury amounted to mitigating evidence. . . ., particularly in light of the fact that counsel saw no evidence of organic brain damage. As such counsel chose not to investigate. Moreover, Petitioner's attempt to refute counsel's decision by utilizing the testimony of an "expert witness" deemed unqualified to offer an expert opinion on Petitioner's head injury does not satisfy his burden of proof.

(DCO at 8-9, App. at 18a).

While a head injury might be mitigating, it is not Petitioner's assertion that this injury was necessarily mitigating in and of itself. (FAP at 19-23). Rather, he argues, pursuant to *Wiggins*, 539 U.S. at 521, that the severe head injury should cause a reasonable attorney to investigate further. *See id.* This is the specific conduct which Petitioner's trial counsel admits he failed to do and, therefore, his performance is deficient in this regard.

Petitioner also respectfully takes issue with the District Court's observation that "Petitioner's attempt to refute counsel's decision by utilizing the testimony of an 'expert witness' deemed unqualified to offer an expert opinion on Petitioner's head injury does not satisfy his burden of proof." (DCO at 9, App. at 18a). The Court is apparently referring to Petitioner's medical expert's statement that Petitioner's attorney

should have used an expert to evaluate the impact of Petitioner's head injuries. See (M&R at 16-17, App. at 35a) (noting Dr. Reynolds' testimony that a competent attorney should have retained an expert to evaluate the medical records and his belief that jury existence of such an injury and possibility of treatment mitigates Petitioner's culpability). However, Petitioner submits this is not the relevant role of Petitioner's expert in this case. Instead, Petitioner relies upon his expert to provide an opinion as to whether Petitioner suffers from brain damage or other mental illness related to being struck about the head with a baseball bat. Thus, with respect to the expert's opinion about the trial attorney's performance, it is another source which shows the trial attorney's failures were unreasonable.

Additionally, the District Court's observation does not negate, as established above, the trial attorney's statement which shows he should have investigated further. In other words, the expert's opinion in this regard does not negate the specific words of the trial attorney, who admitted he knew of the brain injury and failed to investigate further.

Moreover, there were other indications in the record which should have led trial counsel to investigate Petitioner's head injury further. As noted above, and as the District Court pointed out in its opinion, Petitioner had associated with violent gang members, been in criminal trouble as a youth, and spent time in a psychiatric hospital prior to his head injury. (DCO at 9, App. at 19a). The trial testimony from his own parents revealed he was a troubled young man. *Id.*, App. at 19a. Petitioner's own trial attorney put on evidence that Petitioner had fathered a child and that, if given probation, Petitioner would

move into the home his parents currently shared with Petitioner's common law wife and baby. (FAP at 9). Trial counsel was aware of this entire history, yet he failed to investigate whether Petitioner suffered from the symptoms of any psychological or neuropsychological brain disorder as a result of being beaten about the head with the baseball bat, such as impulse control, a tendency toward aggression, and poor emotion regulation. He failed to investigate whether medication would help shed light on some of Petitioner's aggressive tendencies in an effort to mitigate his crime before the jury. Petitioner submits this failure constitutes deficient performance.

On the issue of prejudice, the Federal District Court's holding appears to be two-fold. First, the Court held "considering the list of aggravating circumstances and Petitioner's violent tendencies prior to his head injury, this Court is not convinced that evidence Concerning brain damage occurring *after* these incidences [referring to Petitioner's past delinquent behavior and admission to a psychiatric hospital] would have had any effect on his sentence." (DCO, at 9, App. at 19a) (emphasis in original). Second, the Court believed the sentence would not be less harsh because Petitioner's "sentence of fifty years actually falls in the mid-range on the possible statutory punishment for murder." *Id.* at 10, App. at 19a.

Regarding its first holding, the Federal District Court cites *Rompella,* 545 U.S. at 374, and *Wiggins,* 539 U.S. at 512, wherein this Court found counsel was ineffective for failing to investigate records indicating mental illness and a disruptive background in an effort to present mitigation evidence. In other cases, this

Court has expressly recognized that such circumstances can justifiably motivate jurors to impose a lesser sentence. *See e.g., Parker v. Dugger,* 498 U.S. 308, 314 (1991) (pointing out there was "no question" that evidence of a "difficult childhood" was constitutionally mitigating); *Hitchcock v. Dugger,* 481 U.S. 393, 398 (1987) (finding that the "difficult circumstances of [the defendant's] upbringing" were mitigating); *Eddings v. Oklahoma,* 455 U.S. 104, 116 (1982) (noting defendant was "raised in a neglectful, sometimes even violent, family background" was mitigating); *see also California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (noting that "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse"). Additionally, this Court recently reiterated that the failure to investigate a defendant's childhood background, especially in light of relevant mental health issues, constitutes a violation of the defendant's right to a fair trial. *See Brewer v. Quarterman,* 127 S. Ct. 1706 (2007) (jury must not be prevented from giving meaningful consideration to constitutionally relevant mitigating evidence of depraved or difficult childhood); *Abdul-Kabir v. Quarterman,* 127 S. Ct. 1654 (2007) (depraved or difficult childhood is mitigating evidence which should be given meaningful consideration by jury). Although these cases involved the death penalty, this tribunal has determined that mitigating evidence introduced in a capital sentence is to be given no different consideration than mitigating evidence introduced in a non-capital case. *Tennard v. Dretke,* 524 U.S. 274, 284 (2004).

Here, it is undisputed per the affidavits and evidence that Petitioner suffered serious head trauma as a result of being beaten with a baseball bat. It is also undisputed per trial counsel's own affidavit that the attorney knew of the seriousness of these injuries, but failed to investigate further. (App. at 54a). It is further undisputed from the medical records that Petitioner underwent extensive medical treatment and surgery following the attack with the baseball bat. Furthermore, the information contained in the mental health expert's affidavit, which was not contested by any other expert, establishes that Petitioner likely lacked impulse control causing him to become overly aggressive as a result of the trauma inflicted to his head by the baseball bat. (M&R at 16, App. at 35a). Moreover, there were other indications in the record which should have led trial counsel to investigate Petitioner's head injury further. As the Federal District Court pointed out in its opinion, Petitioner had associated with violent gang members, been in criminal trouble as a youth, and spent time in a psychiatric hospital prior to his head injury. (DCO at 9, App. at 19a). Trial counsel was aware of this entire history, yet he failed to investigate, as an explanation for his actions on the day of the shooting, whether Petitioner suffered from the symptoms of any psychological or neuropsychological brain disorder, such as impulse control, a tendency toward aggression, and poor emotion regulation, as a result of the trauma to his head. *Id.*. App. at 19a. Finally, even the prosecutor suggested the jury impose a thirty year sentence, and yet, he received a term of fifty years. (FAP at 7). As noted above, this Court has repeatedly recognized that circumstances such as those present in

the instant case can justifiably motivate jurors to impose a lesser sentence. *See e.g., Parker,* 498 U.S. at 314; *Hitchcock,* 481 U.S. at 398; *Eddings,* 455 U.S. at 116. Accordingly, Petitioner submits this evidence is mitigating in nature, despite the fact that he had experienced a difficult childhood and exhibited signs of mental health issues prior to being beaten with the baseball bat.

Petitioner also respectfully submits there is no merit to the District Court's conclusion there is no prejudice because a fifty year sentence is only mid-range. Under Texas law, Mr. Anthony will be eligible for parole in twenty-five years. TEX. CODE CRIM. PROC. art. 37.07 § 4(a). Any defendant who received a prison term of sixty to ninety-nine years or life will be eligible for parole in thirty years, *id.*, only five years more than Petitioner's purported "half the range" sentence. Prejudice is further evidenced by the fact that even the prosecutor argued for a thirty-year term. For these reasons, resolving doubt in favor of Petitioner, and based on a limited, threshold inquiry concerning the merits of this punishment-mitigation argument, Petitioner submits this ineffective assistance of counsel claim is debatable among reasonable jurists and adequate to deserve encouragement to proceed further. *Miller-El,* 537 U.S. at 336; *Sonnier,* 161 F.3d at 944.

3. Self-Defense Issues Related to the Foreclosure of this Theory

a. Resolving Doubt in Petitioner's Favor, the District Court's Interpretation of the Relevant Statutory Language Merits the Granting of a COA

Although the United States Court of Appeals for the Fifth Circuit interpreted Petitioner's argument to be a challenge to the District Court's actual denial of his claim, Petitioner intended to show the District Court's interpretation of the relevant statutory language means that, resolving doubt in favor of Petitioner, the merits of the argument that the theory of self-defense was foreclosed is debatable among reasonable jurists and adequate to deserve encouragement to proceed further. *Sonnier,* 161 F.3d at 944.

Under Texas law, the use of force against another is not justified if the person claiming justification "sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was [unlawfully] carrying a weapon in violation of Section 46.02 [of the Texas Penal Code]." TEX. PENAL CODE § 9.31(b)(5). (Petitioner-Appellant's Application for Certificate of Appealability, pp. 27-28). It is undisputed that, prior to trial, counsel was aware that Petitioner shot Mr. Brown after following him into a parking lot to have some sort of conversation, after Mr. Brown had struck Petitioner's car from behind, causing it damage. *Id.* at 28. It is further undisputed that Petitioner's attorney was also aware that

Petitioner sought this conversation with Mr. Brown while Petitioner was unlawfully carrying a weapon in violation of section 46.02 of the Texas Penal Code. *Id.* Petitioner respectfully submits that his trial counsel was constitutionally ineffective for pursuing, as his sole defense, a self-defense theory which would be unsuccessful due to the application of section 9.31(b)(5) of the Texas Penal Code. *Id.*

In response to Petitioner's argument that self-defense was unavailable, the State argued trial counsel's actions were reasonable because the jury could have concluded that Petitioner was merely approaching Mr. Brown to exchange insurance information. *Id.* at 29. The Magistrate Judge concurred, noting that Texas law does not preclude, as a matter of law, an instruction on self-defense where the defendant unlawfully carried a weapon to the "discussion" with the decedent. (M&R at 11, App. at 30a-31a). The Federal District Court agreed. (DCO at 7, App. at 15a-16a). Importantly, the District Court further expressly found that "the exchange of insurance information is often the resolution of a traffic accident." Id. at 7, App. at 16a. Petitioner respectfully submits that, pursuant to this clear finding of the Federal District Court, such an exchange must be considered a "discussion" concerning the fact that Mr. Brown had just caused damage to Petitioner's car. (FAP at 29-30). In other words, the Federal District Court has found there is no semantic difference between seeking an "explanation or discussion" of "differences" and the exchange of insurance information after a car accident. *Id.* at 30. Petitioner therefore respectfully submits that trial counsel could not have reasonably relied on this

semantic difference to prove self-defense. *Id.* at 30-31. Petitioner thus contends, resolving doubt in his favor, he is entitled to a COA because the issue is at least debatable among reasonable jurists and/or adequate to deserve encouragement to proceed further. *Sonnier,* 161 F.3d at 944.

b. The Evidence Supports the Granting of a COA on the Threshold Inquiry Concerning the Merits of this Claim

Presuming self-defense is not precluded as a matter of law based on the Federal District Court's holding discussed above, Petitioner contends that resolving doubt in his favor, and based on a limited, threshold inquiry concerning the merits of Petitioner's claim that the self-defense theory was foreclosed, his claim is debatable among reasonable jurists and adequate to deserve encouragement to proceed further. *Miller-El,* 537 U.S. at 336; *Sonnier,* 161 F.3d at 944.

The Magistrate Judge concluded Petitioner had failed to offer any evidence to contradict trial counsel's assertion that he was aware, and understood, the exception to self-defense. (M&R at 12, App. at 31a). The Federal District Court found trial counsel acted reasonably without reaching the evidence in this case. (DCO at 6-8, App. at 14a-17a.)

As set forth in objections to the Memorandum and Recommendation, Petitioner submits trial counsel's failure to question prospective jurors on the topic of the "explanation or discussion" of "differences" exception demonstrates counsel's failure to either know or fully appreciate the impact the exception would have on Petitioner's ability to claim self-defense.

(Petitioner's Objections to U.S. Magistrate Judge's Memorandum and Recommendation, Docket No. 18, p. 5). In the event Petitioner's conviction or acquittal depended on whether the jury would conclude that seeking to exchange insurance information after an accident was something entirely different than seeking a "discussion" about the parties' differences, a reasonable attorney would necessarily opt to inform and question prospective jurors on this critical issue. *Id.* Here, the fact that trial counsel did not do so indicates that he failed to understand or fully appreciate the application of the exception to the justification defense to Petitioner's case. *Id.* Moreover, there appears to be no reasonable trial strategy which would justify failing to question prospective jurors regarding "the most critical issue in the case." *Id.*

The Magistrate Judge pointed out that trial counsel did argue his theory at closing, stating "several times that [Mr.] Anthony did not follow [Mr.] Brown to discuss their differences, but merely to exchange insurance information." (M&R at 13, App. at 32a). As discussed in the objections to the Memorandum and Recommendation, this argument came after the State had questioned Petitioner on cross-examination, and Petitioner had admitted that he followed Mr. Brown "seeking resolution to the accident." (Petitioner's Objections to U.S. Magistrate Judge's Memorandum and Recommendation, Docket No. 18, p. 6) (quoting Anthony Testimony, p. 54).

The Federal District Court found that the jury could reasonably believe that Petitioner approached Mr. Brown in order to exchange insurance information rather than discuss "differences." (DCO at 7, App. at

16a). While this was the defensive theory, on cross-examination, the prosecutor asked Petitioner: "So you wanted to resolve the situation" and Petitioner responded: "I just–yeah, exact–about the –see what had taken place, why it had taken place." Later, the prosecutor asked: "You were seeking resolution to the accident, correct?" Petitioner responded: "Yes." (Petitioner's Objections to U.S. Magistrate Judge's Memorandum and Recommendation, Docket No. 18, p. 6 n.2) (citing Anthony Testimony, pp. 52, 54). Any finding that Petitioner could have followed Mr. Brown only to exchange insurance information is, in this regard, belied by the record. "Seeing what happened and why, and attempting to resolve the situation, fall under the category of seeking an explanation from or discussion with the other person concerning the actor's differences with the other person." *Id.* (citing TEX. PENAL CODE § 9.31(b)(5)). As trial counsel stated in his affidavit, he continued to pursue a claim of self-defense because he thought that "if the jury believed Petitioner when he said that he thought his life was in danger from the victim, Samuel Brown, they would acquit him of the charge of murder." (App. at 54a). However, the facts and the evidence establish that trial counsel's initial decision to rely on self-defense as Petitioner's sole defense to the murder charge was unreasonable and, therefore, his performance was deficient.

Petitioner contends he was prejudiced as a result of counsel's deficient performance because the pursuit of the self-defense theory required Petitioner to testify. The Federal District Court found "the fact that counsel's decision to use a self-defense theory required Petitioner to take the stand–wherein he

explained his actions immediately following the accident–does not reach the high standard for prejudice required in an ineffective assistance of counsel claim." (DCO at 7, App. at 16a). The Federal District Court also stated that Petitioner "provides the Court with no solid ground for believing that Petitioner was denied the right to a fair trial by his admissions during his own testimony." *Id.*, App. at 16a-17a.

While ultimately it was Petitioner's decision to testify regardless of counsel's urging, the Federal District Court concluded that "the exchange of insurance information is often the resolution of a traffic accident." (DCO at 7, App. at 16a). As discussed above, because these are one and the same, Petitioner was prejudiced and denied the right to a fair trial because his sole defense was not provable as a matter of law.

Presuming there is a distinction between the exchange of insurance information and the resolution of a traffic accident, Petitioner was prejudiced because his testimony, which was necessary given the self-defense theory, elicited many details which harmed him. Through Petitioner, the jury heard that he fled the scene of the crime and went to Mexico, that he disposed of the weapon, and that he saw Mr. Brown "wince" after he shot him, then drove away rather than calling for medical assistance. (DCO at 2, App. at 10a); (FAP at 4). It is undisputed the jury would not have heard these details had Petitioner not testified, and his testimony was only necessary because counsel had determined that justification was a viable defense to the charges. Moreover, after Petitioner's testimony that he had stopped Mr. Brown to see "what had taken

place, why it had taken place" and that he was seeking "a resolution to the accident," trial counsel's closing argument that his client was merely seeking insurance information was belied by the record.

Although the District Court does not discuss the issue, the Magistrate Judge concluded Petitioner had failed to demonstrate prejudice because he could not have pursued a defense based on mistaken identity. (M&R at 14, App. at 33a). As discussed in Petitioner's objections to the Memorandum and Recommendation, although various witnesses claimed they could identify the vehicle speeding from the scene as a black sport utility vehicle, and two men claimed to be able to identify Petitioner as the driver, there was fertile ground for cross-examination and impeachment based on the observers' distance from the location of the shooting. (Petitioner's Objections to U.S. Magistrate Judge's Memorandum and Recommendation, Docket No. 18, p. 7). For example, one witness was able to identify the driver as a young Hispanic male. *Id.* at 7-8 (citing 5 R.R. 25). Most importantly, however, Petitioner, in all likelihood, would not have testified to the details which likely incited and inflamed the jury against him, resulting in a fifty year prison sentence. *Id.* at 8. The notion that deficient performance at the guilt phase can never cause prejudice at the punishment phase has been rejected by the Fifth Circuit. *Moore v. Johnson,* 194 F.3d 586, 589 (5th Cir. 1999). Instead, when the same jury considers guilt and punishment, the relevant inquiry is "whether the cumulative errors of counsel rendered the jury's findings, either as to guilt or punishment, unreliable." *Id.*

Petitioner submits he has shown for purposes of the issuance of a COA that trial counsel's performance was deficient and that he was prejudiced by this performance because the jury's findings were unreliable given the fact that trial counsel had relied on a self-defense theory which was not reasonably provable at trial. Resolving doubt in favor of Petitioner, and based on a limited threshold inquiry concerning the merits of this claim, Petitioner therefore submits this ineffective assistance of counsel claim is debatable among reasonable jurists and adequate to deserve encouragement to proceed further. *Miller-El,* 537 U.S. at 336; *Sonnier,* 161 F.3d at 944.

CONCLUSION

WHEREFORE, Petitioner, Richard Anthony, Jr., requests this Honorable Court grant this petition and issue a Writ of Certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit denying the issuance of a Certificate of Appealability on Petitioner's ineffective assistance of counsel claims.

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(210) 227-6000

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-50220

U.S. COURT OF APPEALS
FILED
JUNE 9, 2008
CHARLES R. FULBRUGE, III
CLERK

RICHARD ANTHONY, JR
Petitioner-Appellant

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION
Respondent-Appellee

Appeal from the United States District Court for the Western District of Texas, San Antonio

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Before HIGGINBOTHAM, STEWART, and OWEN, Circuit Judges.

PER CURIAM:
A member of this panel previously denied appellant's motion for certificate of appealability. The panel has considered appellant's motion for reconsideration. IT IS ORDERED that the motion is denied.

/s/	/s/	/s/
PEH	PRO	CES

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-50220
USDC No. 5:05-CV-477

U.S. COURT OF APPEALS
FILED
APR 10 2008
CHARLES R. FULBRUGE, III
CLERK

RICHARD ANTHONY, JR

Petitioner-Appellant

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeal from the United States District Court for the Western District of Texas, San Antonio

---

ORDER:

Richard Anthony, Jr., Texas prisoner #1088992, was convicted of murder in 2002 and seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 petition. To obtain a

COA, Anthony must demonstrate that "reasonable jurists would find the district court's assessment of [his] constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).

Anthony argues that the district court erred in denying his claim that counsel was ineffective for failing to investigate the injury to his head in September 1997 because it conceded that resolution of the issue was a "close call" because the affidavit submitted by counsel in the state habeas proceedings showed the counsel had information that should have prompted him to investigate Anthony's head injury, and because Anthony submitted an affidavit by a mental health expert stating that the information available to counsel should have prompted an investigation into Anthony's head injury. Anthony argues that the information concerning his head injury would have led the jury to impose a lesser sentence.

Anthony also argues that the district court erred in denying his claim that counsel was ineffective for pursuing only a self-defense theory at trial. He argues that, based upon the facts of his case, that defense was not legally available to hm and that his attorney should have presented a defense of mistaken identity. He claims that he was prejudiced by the self-defense theory because it required him to testify and his testimony elicited details of the crime that prejudiced him at the guilt and punishment phases of his trial.

Anthony fails to show that reasonable jurists would debate the district court's denial of these claims.

See Slack, 529 U.S. at 484. Anthony's motion for a COA is therefore DENIED.

/s/
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
May 23 2007
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
By /s/
Deputy Clerk

RICHARD ANTHONY, JR., TDC # 1088992,	§	
Petitioner	§	
v.	§	Civil Action
	§	No. SA-5-CA-477-RF
NATHANIEL A. QUARTERMAN, Texas Department of Criminal Justice Correctional Institutions Division Director,	§	
Respondent	§	

ORDER

Petitioner Richard Anthony, Jr.'s Notice of Appeal construed as a motion for certificate of

appealability (Docket Entry #25) to appeal the dismissal of his 28 U.S.C. § 2254 Habeas Corpus Petition is **DENIED** for the reasons stated in the Magistrate Judge's Memorandum and Recommendation (Docket Entry # 14) and this Court's Order Adopting Magistrate Judge's Report and Recommendation (Docket Entry # 19). Petitioner's Petition and appeal fail to make "a substantial showing of the denial of a federal right" as required by Fed. R. App. P. 22 for a certificate of appealability. *See Slack v. McDaniel*, 529 U.S. 473, 483, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

DATED: May 23rd, 2007

/s/
ROYAL FURGESON
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
JAN 12 2007
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
By /s/
Deputy Clerk

RICHARD ANTHONY, JR.,	§	
Petitioner,	§	
v.	§	SA: 05-CV-477-WRF
DOUGLAS DRETKE, Director, Texas Department of Criminal Justice, Correctional Inst. Division	§	
Respondent.	§	

FINAL JUDGMENT

On this day, the Court entered an Order adopting the Memorandum and Recommendation of the United States Magistrate Judge denying Petitioner's Amended Petition for a Writ of Habeas

Corpus. The Court now enters its Final Judgment pursuant to FED. R. CIV. P. 58.

It is hereby ORDERED that the Memorandum and Recommendation of the United States Magistrate Judge (Docket No. 14) be ADOPTED IN ITS ENTIRETY.

It is therefore ORDERED that Petitioner's Amended Petition for Writ of Habeas Corpus by a Person in State Custody (Docket No. 3) is DISMISSED.

Signed this 12th day of January, 2007.

/s/
ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
JAN 12 2007
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
By /s/
Deputy Clerk

RICHARD ANTHONY, JR.,	§	
	§	
Petitioner,	§	
	§	
v.	§	SA: 05-CV-477-WRF
	§	
DOUGLAS DRETKE, Director, Texas Department of Criminal Justice, Correctional Inst. Division	§	
	§	
Respondent	§	

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

BEFORE THE COURT is the Memorandum and Recommendation of U.S. Magistrate Judge John W. Primomo (Docket No. 14), filed October 26, 2005, and Petitioner's Objections (Docket No. 18), filed November

21, 2005. After due consideration of the briefs, facts, and law applicable to this case, the Court fully ADOPTS the decision in the Memorandum and Recommendation of the U.S. Magistrate Judge to DENY Petitioner's Amended Petition for a Writ of Habeas Corpus (Docket No. 3).

BACKGROUND

Petitioner Richard Anthony, Jr. Was charged by indictment in the 144th Judicial District Court of Bexar County, Texas with the murder of Samuel Brown on December 30, 2000 by shooting hm with a firearm.[1] At trial, Petitioner testified that after his car was struck by another car, Petitioner followed the other car, fearing that it was fleeing the accident scene. The driver of the "other" car, the deceased Samuel Brown, eventually exited his car and approached Petitioner's car to ask why Petitioner was following him. Petition testified that when he told Brown of the car damage, Brown made threatening comments and moved towards Petitioner. Recalling that he had suffered a head injury before and that his doctor told him another blow could kill him,[2] Petitioner panicked, grabbed a pistol in the glove compartment, and fired twice. Petitioner did not have a permit to carry the weapon. Petitioner then fled to Mexico, returning to San Antonio several days later. At trial, Petitioner's attorney sought acquittal on the basis of self-defense.[3]

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[1]Cause No. 2001-CR-4920

[2]When Petitioner was seventeen, he suffered a severe head injury after being struck by a baseball bat.

[3]See Pet'r's Am. Pet. (Docket No. 3, Ex. A Pet'r's Test.).

After a jury found Petitioner guilty, the state court sentenced him to serve fifty years in prison. This sentence was in accordance with the verdict of the jury on punishment. The Texas Fourth Court of Appeals affirmed Petitioner's conviction on March 12, 2003, and the Texas Court of Criminal Appeals denied is petition for discretionary review. On December 7, 2004, Petitioner filed a state habeas application under Article 11.07 of the Texas Code of Criminal Procedure. The Texas Court of Criminal Appeals denied the application on May 18, 2005.[4]

One day after this denial, Petitioner filed a petition for a writ of habeas corpus in this Court pursuant to 28 U.S.C. § 2254, challenging his state court conviction for murder. In his petition, Petitioner alleged that he received ineffective assistance of counsel at trial when his attorney: (1) failed to request a lesser-included offense instruction on manslaughter; (2) pursued a theory of self-defense which was foreclosed as a matter of law; and (3) failed to investigate issues of mental health and brain injury relevant to punishment.

Reviewing the petition, U.S. Magistrate Judge John W. Primomo denied the habeas writ. In his Memorandum and Recommendation, Judge Primomo first asks that Petitioner withdraw his claim for ineffective assistance of counsel as to the lesser-included offense instruction. Referencing transcripts from state court arguments, Jude Primomo makes it clear that the claim is disingenuous. In response, Petitioner withdrew this argument.

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[4]*See* U.S. Magistrate Judge's Mem. & Recommendation (Docket No. 14 at 2).

As to Petitioner's other two ineffective assistance of counsel claims–advancing a self-defense theory that was inapplicable as a matter of law and failing to investigate brain damage issues pertinent to punishment–Judge primomo found that Petitioner failed to meet the standard of proof required for the Court to grant habeas on such claims. Specifically, Judge Primomo, evaluating both the transcripts, the applicable law, and the affidavit of Petitioner's counsel, contends that Petitioner's counsel's decision to argue self-defense was entirely reasonable. Upon review of the brain damage evidence, Judge Primomo determined that not only was there little evidence of any brain damage, but that Petitioner's counsel did not act unreasonably in failing to utilize brain damage as a mitigating factor in the punishment phase of trial.

Petitioner filed objections to Judge Primomo's recommendations, focusing only on the self-defense and punishment mitigation aspects of his original habeas petition. The Court now reviews these objections in light of recommendations and other evidence.

STANDARD OF REVIEW

In general, the District Court reviews a magistrate judge's report and recommendation for findings and conclusions that are either clearly erroneous or contrary to law.[5] If, however, a party files specific objections to the recommendation within ten days of service, the Court reviews the controverted

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[5]28 U.S.C. § 636 (b)(1) (2005); *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989).

findings de novo.[6] Despite timely filing of objections, the Court need not consider objections that are frivolous, conclusive, or general in nature.[7]

In the present case, Petitioner timely filed specific objections to the Magistrate Judge's Memorandum and Recommendation, thus warranting de novo review by the Court.[8] Upon de novo review, the Court may accept, reject, or modify in whole or in part, the findings or recommendations made by the magistrate.[9] De novo review of a magistrate's recommendation requires that the Court consider the relevant evidence of record and not merely review the magistrate's recommendation.[10] It is with this standard in mind that the Court now reviews the objections, responses, and transcript of the evidentiary hearing.

ANALYSIS

Petitioner's objections focus solely on ineffective assistance of counsel claims. To obtain habeas relief on a claim of ineffective assistance of counsel, a petitioner must demonstrate that his counsel was deficient and that the deficiency prejudiced his

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[6]28 U.S.C. § 636(b)(1) (2005).

[7]*Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

[8]*See* Pet'r's Req. For Extension of Time to File Objections (Docket no. 16) seeking a twelve day extension to file timely objections); Pet'r's Objections to U.S. Magistrate Judge's Mem. & Recommendation (Docket No. 18).

[9]28 U.S.C. § 636(b)(1)© (2005); FED. R. CIV. P. 72(b).

[10]*See, e.g., In re Griego*, 64 F.3d 580 (10th Cir. 1995).

defense.[11] A finding of deficiency "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment.[12] A convicted defendant carries the burden of proof for deficiency and must overcome a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance.[13]

Further, even if the defendant proves that counsel acted in a professional unreasonable manner, counsel's error must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.[14] Proving prejudice requires more than the mere possibility of a different outcome.[15] The deficient performance must prejudice the defense in such a serious way as to essentially deprive the defendant the right to a fair and reliable trial.[16]

Petitioner's objections stem from his counsel's decisions to (1) focus on the theory of self-defense and (2) not investigate potentially-mitigating brain damage issues. Using the ineffective assistance of counsel test stated above, the Court analyzes each of these objections in turn.

A. Self-Defense

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[11] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

[12] *Id.*

[13] *Id.* at 689-91.

[14] *Id.* at 692.

[15] *Johnson v. Cockrell*, 301 F.3d 234, 239 (5th Cir. 2002).

[16] *Strickland*, 466 U.S. at 687.

Because it is not entirely clear that self-defense was foreclosed as a defense in this case, Petitioner's counsel's decision to seek acquittal on the basis of self-defense is within the bounds of a reasonable attorney. Section 9.31(a) of the Texas Penal Code provides that "a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force."[17] Section 9.31(b)(5), however, limits self-defense by stating that "[t]he use of force against another is not justified . . . if the actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was [unlawfully carrying a weapon.]"[18]

Petitioner asserts that because counsel knew both that Petitioner was unlawfully carrying the gun with which he killed Brown and that Petitioner had followed Brown's car, that § 9.31(b)(5) automatically precluded the self-defense option. The decision to follow the self-defense theory, therefore, amounts to ineffective assistance of counsel. The Court disagrees.

The Court believes that Petitioner's counsel acted reasonably because the jury could have concluded that Petitioner's actions fell outside the § 9.31(b)(5) limitation. Noting that Texas law requires drivers to exchange insurance information after a traffic accident, the state habeas court stated that it was a "highly debatable fact question whether (in the

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[17] TEX. PENAL CODE ANN. § 9.31(a) (Vernon 2006).

[18] *Id.* § 9.31(b)(5).

language of the statute) [Petitioner's] conduct constituted 's[eeking] an explanation from or discussion with the other person concerning the actor's differences with the other person.'"[19] Essentially, if a jury could reasonably believe that Petitioner approached Brown in order to exchange insurance information–rather than discuss differences–they could acquit Petitioner on the basis of self-defense even if he unlawfully possessed the weapon.

Despite Petitioner's assertion that his own testimony weakened the self-defense theory, the Court does not believe that it required an entire change of trial strategy. Petitioner's trial statement that he was "seeking resolution of the accident" does not necessarily mean that he was not seeking an exchange of insurance information. To the contrary, the exchange of insurance information is often the resolution of a traffic accident. As the Supreme Court has stated, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ."[20] As such, his counsel's decision to stick with the self-defense theory was not so unreasonable as to fall outside of the broad range of acceptable professional assistance.

Further, the fact that counsel's decision to use a self-defense theory required Petitioner to take the stand–wherein he explained his actions immediately following the accident–does not reach the high standard for prejudice required in an ineffective assistance of counsel claim. First, the Court reminds

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[19]State Habeas Records, pp. 170-76.

[20]*Strickland*, 466 U.S. at 690-91.

Petitioner that, regardless of counsel's urging, it is ultimately the defendant's decision to testify. Moreover, Petitioner provides the Court with no solid ground for believing that Petitioner was denied the right to a fair trial by his admissions during his own testimony. Petitioner has not met his burden of proof as to either prong of the inefficient assistance of counsel standard. Accordingly, Petitioner's habeas claim for ineffective of counsel based on the self-defense theory is DENIED.

B. Punishment Mitigation

Petitioner's contention that counsel failed to investigate petitioner's potentially mitigating head injury also falls short of ineffective assistance of counsel. While the Court does not believe that Petitioner's counsel's decision to not investigate Petitioner's head injury was entirely unreasonable, the Court admits that this is a close call. Under the ABA Standards, "[d]efense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."[21] In interpreting this duty, however, the Supreme Court has stated that counsel can decide not to investigate, but that "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.[22]

Petitioner argues that counsel's decision not to

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[21] 1 ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (3d ed. 1993).

[22] *Strickland*, 466 U.S. at 690-91.

investigate the head injury was entirely unreasonable because counsel had Petitioner's medical charts, which explained that Petitioner had suffered from a head injury. This head injury can lead to organic brain damage. Had counsel investigated this head injury, Petitioner argues, mitigating evidence may have been produced at the punishment phase of the trial.

While the Court acknowledges that a clear indication of a mitigating factor requires investigation, the Court does not believe that Petitioner's head injury is clearly mitigating.[23]

Petitioner's counsel's affidavit indicates that while he looked at the medical records and acknowledged that Petitioner had suffered the head injury, counsel did not believe that the head injury amounted to mitigating evidence. Counsel *did* believe that the medical records were relevant to prove that Petitioner reasonably believed that his life would be in danger if he suffered another head injury. In counsel's view, the head injury's relevancy to the guilt-innocence phase of the trial simply did not translate to the punishment phase, particularly in light of the fact that counsel saw no evidence organic brain damage. As such, counsel chose not to investigate. Moreover, Petitioner's attempt to refute counsel's decision by utilizing the testimony of an "expert witness" deemed

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[23] *See, e.g., Rompilla v. Beard*, 545 U.S. 374 (2005) (finding ineffective assistance of counsel with defense counsel failed to look at a file that the prosecution stated it would use at sentencing); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (finding ineffective assistance of counsel when counsel did not investigate when defendant had no criminal background, extensive medical and psychiatric files, and could not remember the criminal incident).

unqualified to offer an expert opinion on Petitioner's head injury does not satisfy his burden of proof.

Even if, however, the Court believed that Petitioner's counsel acted in an unreasonably deficient manner, the Court does not find sufficient evidence to support Petitioner's contention that prejudice existed. The Court is mindful of the many aggravating events in Petitioner's past. Prior to his head injury, Petitioner engaged in such delinquent behavior as drug use, possession, theft, assault, and gang membership.[24] This behavior landed Petitioner in a psychiatric hospital, wherein he admitted to involvement in drive-bys and robberies.[25] Considering the list of aggravating circumstances and Petitioner's violent tendencies *prior* to his head injury, the Court is not convinced that evidence concerning brain damage occurring *after* these incidences would have had any effect on his sentence.

Petitioner's sentence of fifty years actually falls in the mid-range on the possible statutory punishment for murder. Introducing evidence of a brain injury as proof that Petitioner may have been more violent than the average person would have little mitigating effect in light of his violent past. The Court believes that such brain-injury evidence would not have substantially decreased Petitioner's sentence, and therefore no prejudice exists. Accordingly, the Court DENIES Petitioner's objection based on this punishment mitigation.

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[24]Reporter's Record, Vol. 7, pp. 15-45.

[25]*Id.*

CONCLUSION

Petitioner's objections do not convince the Court that it should alter Magistrate Judge Primomo's Recommendations. As such, the Court ADOPTS IN FULL the Memorandum and Recommendation of U.S. Magistrate Judge John Primomo. In accordance with this decision, the Court DENIED Petitioner's Amended Petition for a Writ of Habeas Corpus (Docket No. 3).

It is so ORDERED.

Signed this 12th day of January, 2007.

/s/

ROYAL FURGESON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
Oct 26 2005
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
By /s/
Deputy Clerk

RICHARD ANTHONY, JR.,	*	
Petitioner,	*	
v.	*	Civil No. SA-05-CA-477-RF
DOUGLAS DRETKE, Director, Texas Department of Criminal Justice, Correctional Inst. Division,	*	
Respondent.	*	

MEMORANDUM AND RECOMMENDATION

Richard Anthony, Jr., an inmate in the custody of the Texas Department of Criminal Justice–Correctional Institutions Division ("TDCJ-CID"), has filed an application for a writ of habeas

corpus, pursuant to 28 U.S.C. Section 2254, challenging his state court conviction for murder. Petitioner alleges that he received ineffective assistance of counsel at trial when his attorney (1) pursued a theory of self-defense which was foreclosed as a matter of law, (2) failed to investigate issues of mental health and brain injury relevant to punishment, and (3) failed to request a lesser-included offense instruction on manslaughter. Respondent has filed an answer (docket no. 12), to which answer petitioner has responded (Docket no. 13). Having considered the pleadings, the state court records, and the applicable law, the Court is of the opinion this habeas petition should be denied.

Background

Anthony was charged by indictment in the 144th Judicial District Court of Bexar County, Texas with the murder of Samuel Brown on December 30, 2000 by shooting him with a firearm, cause no. 2001-CR-4920. He was found guilty by a jury and, on February 15, 2002, he was sentenced in accordance with the verdict of the jury on punishment, to serve 50 years in the TDCJ-CID. His conviction was affirmed by the Texas Fourth Court of Appeals on March 12, 2003, and the Texas Court of Criminal Appeals denied his petition for discretionary review. On December 7, 2004, petitioner filed a state habeas application under Article 11.07 of the Texas Code of Criminal Procedure. The Texas Court of Criminal Appeals denied the application on May 18, 2005.

Analysis

1. Exhaustion

Respondent contends that Anthony failed to exhaust available state court remedies on his claim

that his trial counsel rendered ineffective assistance by failing to request an instruction on the lesser-included offense of manslaughter. Section 2254(d) precludes the granting of a federal habeas petition filed by a person in custody pursuant to a state court judgment, unless it appears that he has exhausted available state court remedies. ***Martinez v. Johnson***, 255 F.3f 229, 238 (5th Cir. 2001). The exhaustion requirement is satisfied when the substance of the federal habeas claim has been fairly presented to the highest state court. ***Picard v. Connor***, 404 U.S. 270, 275-76 (1971). The record reflects that Anthony's direct appeal included a claim that the trial court erred in failing to charge the jury on lesser-included offenses but neither on appeal nor in his state habeas petition did Anthony claim that his attorney erred in failing to request such a charge.

In his reply, Anthony asserts that the exhaustion requirement has been satisfied. He points out that, in a motion for new trial, he argued that the state trial court erred in failing to submit a charge on lesser-included offenses or, in the alternative, this error constituted ineffective assistance of counsel. **Clerk's Record**, Vol. I, pp. 93-95. Anthony then states that he alleged on appeal that the state trial court erred in failing to grant the motion for new trial. Thus, he contends that he has exhausted his claim that his attorney rendered ineffective assistance of counsel by failing to request a charge on manslaughter.

Anthony's argument is disingenuous. The motion for new trial specifically alleges, in paragraph 1, that the trial court erred in failing to submit "requested charges" on lesser-included offenses.

Paragraph 2 then generally alleges that he may have been denied the effective assistance of counsel but fails to include any specific error. Instead, Anthony requested a hearing to develop the record by identifying acts of omission "not readily apparent on the record." The reference to "requested charges" clearly suggests, albeit erroneously, that Anthony's trial attorney did not seek charges on lesser-included offenses. Thus, the subsequent reference in the motion for new trial to acts of omission by trial counsel was not intended to include the failure to request a lesser-included charge on the offense of manslaughter. This conclusion is buttressed by the fact that Anthony sought a hearing to establish acts of omission which were not apparent from the record. Trial counsel's failure to request lesser-included offense instructions would clearly be apparent either from the clerk's records or the trial transcript. The Court rejects Anthony's contention that his motion for new trial included a claim that his attorney rendered ineffective assistance by failing to request a jury instruction on the lesser-included offense of manslaughter.

Anthony's counsel's argument that he raised this issue on appeal is also misleading. His brief on appeal asserts that the state trial court "abused its discretion in denying appellant's timely motion for new trial in which he complained of the failure to charge the jury on lesser included offenses . . ." This issue referenced state law on granting a new trial when the trial judge has misdirected the jury and includes no mention of ineffective assistance of counsel. In his reply brief on appeal, Anthony again argues state law as the basis for relief.

Most significantly, in reply to the State's assertion that Anthony's trial counsel failed to request an instruction on a lesser-included offense. Anthony's appellate attorney stated that "[a]ppellant is not raising an ineffective assistance argument in this appeal, thus it does not matter that the record is silent as to why counsel did not request the submission of any lesser included offenses . . ." While the Court could readily conclude from this record that Anthony's current counsel intentionally or recklessly misled the Court regarding the presentation of a claim to the state courts on appeal that his trial attorney failed to request a charge on lesser-included offenses, the Court will assume that the error was inadvertent and that this issue will be withdrawn by counsel in her objections to this recommendation.

Finally, the Court notes that, aside from the fact that Anthony did not allege to the court of appeals that his attorney erred in failing to request a lesser-included offense instruction, his petition for discretionary review to the Texas Court of Criminal Appeals does not raise this claim. In that petition, Anthony alleged only that the court of appeals erred in failing to consider the probable harm resulting from the jury's consideration of extraneous offenses and bad acts. The failure to seek discretionary review in the Texas Court of Criminal Appeals, following affirmance of a conviction by intermediate court, constitutes lack of exhaustion. ***See Richardson v. Procunier***, 762 F.2d 429, 432 (5th Cir. 1985). Although Anthony sought discretionary review, he did not raise the ineffective assistance claim regarding a charge on lesser-included offenses. Thus, he did not fairly presented that claim to the highest state court.

Anthony's assertion that he has exhausted state court remedies for his claim that his attorney rendered ineffective assistance in failing to request a jury charge on the lesser-included offense of manslaughter is factually and legally frivolous.

Although one of Anthony's issues is unexhausted, dismissal of this Section 2254 petition is not necessary. Federal review of an issue of federal law is foreclosed if the petitioner failed to exhaust state remedies and the state court would find that a successive effort to do so would be procedurally barred. ***Coleman v. Thompson,*** 501 U.S. 722, 735 and n.1 (1991). ***See Gray v. Netherland,*** 518 U.S. 152, 161-62 (1996); ***Finley v. Johnson,*** 243 F.3d 215, 219-20 (5th Cir. 2001). ***See also Teague v. Lane,*** 489 U.S. 288, 298-99 (1989). Section 4 of Art. 11.07 of the Texas Code of Criminal Procedure precludes a state court from considering the merits of and granting relief on a subsequent habeas application unless (1) it presents claims which, factually or legally, could not have been presented before, or (2) no rational juror could have found petitioner guilty beyond a reasonable doubts. The Texas abuse-of-the-writ doctrine, as codified in Section 4 of Article 11.07, is ordinarily an adequate and independent procedural bar for purposes of federal habeas review. ***Henderson v. Cockrell,*** 333 F.3d 592, 605 (5th Cir. 2003). Because Anthony would be barred from returning to state court to raise the unexhausted ineffective assistance claim, his petition need not be dismissed. Consideration of the claim is precluded.

2. Ineffective Assistance of Counsel

Petitioner alleges that he received ineffective assistance of counsel at trial when his attorney (1)

pursued a theory of self-defense which was foreclosed as a matter of law, and (2) failed to investigate issues of mental health and brain injury relevant to punishment. These issues were raised in Anthony's state habeas petition. The state habeas court made findings of fact and conclusions of law, and recommended that relief be denied. The Texas Court of Criminal Appeals denied the petition without written order based upon the trial court's findings.

Under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a state prisoner may not obtain relief with respect to a claim adjudicated on the merits in state court unless the adjudication (1) resulted in a decision that was contrary to or involved an unreasonable application of clearly-established federal law, as announced by the Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. **Title 28 U.S.C. Section 2254(d).** A decision is contrary to clearly-established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. ***Williams v. Taylor,*** 529 U.S. 362, 405-06 (2000). It is not enough that the state court applied clearly-established federal law incorrectly. ***Id.*** at 411. Habeas relief can be granted only if the correct legal principle was unreasonably applied by the state courts to the facts of the petitioner's case. ***Id.*** at 413.

To obtain habeas relief on a claim of ineffective assistance of counsel, the petitioner must demonstrate that his counsel was deficient and that the deficiency

prejudiced his defense. ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984). In order to establish that his counsel's performance was constitutionally deficient, a convicted defendant carries the burden of proof and must overcome a strong presumption that the conduct of his trial counsel falls within a wide range of reasonable professional assistance. ***Id.*** at 689-91. An error by counsel, even if professionally unreasonable, must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. ***Id.*** at 692. The mere possibility of a different outcome is not sufficient to prove prejudice. ***Johnson v. Cockrell,*** 301 F.3d 234, 239 (5th Cir. 2002). The petitioner must prove that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. ***Lockhart v. Fretwell,*** 506 U.S. 364, 372 (1993).

A. Self-Defense

At trial, Anthony testified that he was waiting at a traffic light in his vehicle, a black Lincoln Navigator, when he was struck from behind by a maroon car. The car pulled around Anthony and departed. Anthony followed the car to exchange insurance information. The maroon car pulled into a parking lot, followed by Anthony. The driver, Samuel Brown, exited the maroon car and approached Anthony, asking why Anthony was following him. When Anthony responded that Brown had damaged his vehicle, Brown made a threatening statement and moved towards Anthony. Brown extended his hand, which had something in it Anthony could not identify. Recalling that he had suffered a head injury before, and that his doctor told him another blow could kill him, Anthony panicked, grabbed a pistol in the glove

compartment, and fired twice. He did not have a permit to carry the weapon. Anthony left the scene, stopped to get gas and money, and fled to Mexico. He returned to San Antonio several days later. At trial, Anthony's attorney sought acquittal on the basis of self-defense.

In this Section 2254 habeas application, Anthony contends that his attorney rendered ineffective assistance because self-defense was foreclosed as a defense in this case. Section 9.31(a) of the Texas Penal Code provides that a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. However, Section 9.31(b)(5) states that the use of force against another is not justified if the actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was unlawfully carrying a weapon. Anthony state that, at the time of the shooting, he followed Brown to the parking lot to discuss the accident and the damage to Anthony's vehicle. It is undisputed that Anthony was carrying the weapon unlawfully. Thus, he concludes that self-defense was foreclosed under Texas law, rendering trial counsel ineffective for pursuing it. Anthony argues that counsel should have, instead, required the State to meed its burden of establishing identification.

The habeas record includes an affidavit from Roy Barrera, Sr., Anthony's trial attorney, who testified that he was aware of the Section 9.31(b)(5) self-defense limitation but believed that the jury could acquit Anthony if they thought Brown placed his life in

danger. In its findings, the state habeas court, which was also the trial court, found that "the only conceivable defense was self-defense . . ." **State Habeas Records,** pp. 170-76. Noting that Texas law requires drivers to exchange insurance information after a traffic accident, the court stated that it was a "highly debatable fact question whether (in the language of the statute) his conduct constituted 's[eeking] an explanation from or discussion with the other person concerning the actor's differences with the other person.'" The court further concluded that competent counsel could rationally believe that if the jury believed Anthony's testimony that his purpose was merely to exchange insurance information, they could acquit him on the basis of self-defense even if he unlawfully possessed the weapon.

Anthony has not carried his burden of establishing that his attorney's conduct fell outside of a wide range of reasonable professional assistance. As noted by the state habeas court, Anthony appears to argue that the defense of self-defense was precluded as a matter of Texas law. Review of Texas law clearly shows that is not the case under the circumstances presented here. In ***Williams v. State,*** 35 S.W.3d 783, 786 (Tex. App.–Beaumont 2001, ***rev. ref'd***), the Court of Appeals held:

> We agree that where there is a fact issue raised on any of the elements in the "carrying the gun to the discussion" section [of Section 9.31(b)(5)], a defendant would be entitled to a self-defense charge if he satisfied the requirements of section 9.31(a); likewise, if raised by the evidence, an instruction

> limiting the self-defense charge would be warranted under section 9.31(b)(5), if the instruction is requested by the State. However, if the evidence is undisputed that force was not justified as a matter of law because of section 9.31(b)(5), then a self-defense instruction is barred.

Consistent with Texas law, the state trial court instructed the jury on both self-defense and the Section 9.31(b)(5) limitation, indicating its belief that the defense of self-defense was not precluded as a matter of law.[1] Thus, the jury could have concluded that Anthony merely sought to exchange insurance information with Brown after the accident, and not discuss their differences.

In his reply, Anthony asserts that Barrera was either unaware of or failed to understand that Section 9.31(b)(5) limitation. In support of this argument, he states that, during voir dire, Barrera failed to ever mention the limitation to the prospective jurors. First, Anthony has offered no evidence that contradicts the affidavit of Barrera that he was aware of the limitation. Second, the trial transcript reflects that the limitation was discussed during voir dire. As the prosecutor attempted to explain the law, the trial court, concerned about a proper explanation, referenced the Section 9.31(b)(5) limitation. **Reporter's Record,** Vol. 2, p. 99. Soon thereafter,

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[1]While intent to provoke a confrontation can negate self-defense as a matter of law, ***Dyson v. State,*** 672 S.W.2d 460, 463-65 (Tex. Crim. App. 1984), no one claims that Anthony followed Brown to provoke a confrontation.

Barrera requested that the trial court give a full explanation of the law of self defense. ***Id.,*** at p. 101. The trial court did so, specifically citing the applicable limitation. ***Id.,*** at pp. 101-102. Subsequently, the prosecutor again discussed the limitation. ***Id.,*** at p. 142. Thus, no basis exists for concluding that Barrera was unaware of or did not understand the Section 9.31(b)(5) limitation.

In fact, during closing argument, Barrera specifically argued that the facts showed that the Section 9.31(b)(5) limitation was not applicable. He stated several times that Anthony did not follow Brown to discuss their differences but merely to exchange insurance information. **Reporter's Record,** Vol. 6, pp. 117, 123, 128. Anthony contends that defense counsel may not argue jury nullification during closing argument. ***United States v. Trujillo,*** 714 F.2d 102, 106 (11th Cir. 1983). Clearly, Barrera did not ask the jury to ignore the law. He argued that Anthony's testimony established that he acted in self-defense and that the Section 9.31(b)(5) limitation was not applicable because Anthony did not follow Brown to discuss differences. The evidence fails to show that Barrera's performance at trial regarding presentation of the defense of self-defense was defective.

Anthony also suggests, in a footnote, that the State should be judicially estopped from arguing a different position here than the one presented at trial. At trial, the State argued that the jury should find that Anthony was seeking an explanation or discussion regarding differences with Brown and, therefore, was not entitled to claim self-defense. Contrary to Anthony's contention, the State is not now arguing the contrary. Instead, the State asserts that Barrera did

not provide ineffective assistance because a plausible explanation existed for arguing that the Section 9.31(b)(5) limitation did not apply, based upon Anthony's testimony that he was merely seeking to exchange insurance information. The State's argument now that a fact issue existed regarding application of the limitation is consistent with its position at trial. The Court notes that, in discussing objections to the Court's Charge on guilt or innocence, the State did not seek to exclude self-defense as a matter of law based upon the limitation, recognizing at trial that a fact issue for the jury existed. **Reporter's Record,** Vol. 6, pp. 91-99. The fact that the State argued at trial that Anthony was seeking an explanation or discussion does not conflict with its position on Anthony's claim of ineffective assistance of counsel presented in this Section 2254 habeas application.[2]

Anthony has also failed to demonstrate prejudice. In evaluation a clam of ineffective assistance during the guilt phase of the trial, the petitioner must show a "reasonable probability" that, but for counsel's error, the jury would have otherwise harbored a reasonable doubt concerning guilt. ***United States v. Mullins,*** 315 F.3d 449, 456 (5th Cir. 2002). Whether or not self-defense was viable, Anthony offers no alternative defense except identification. The state habeas court found that no other defense existed. Review of the trial record fails to suggest reasonable

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[2]Rather than the State, it is Anthony who presents a position contrary to his testimony at trial. He now claims that he sought a discussion with Brown, while, at trial, he testified that he merely sought to exchange insurance information.

doubt regarding Anthony's identification.

Jeanette Gallardo testified that, after hearing what sounded like gunshots, she went outside of a Family Dollar Store and saw a black Lincoln Navigator speed past her out of the parking lot. **Reporter's Record,** Vol. 4, p. 79. She also saw a red car with Brown lying on the ground next to it. ***Id.***, p. 83. Buster Jones also heard the shots and saw the black Lincoln Navigator. ***Id.,*** pp. 124-25. Jones also recalled the license number of the vehicle. ***Id.*** Roland Helmenstein was able to identify Anthony as the driver from a photographic line-up. ***Id.,*** Vol. 5, pp. 30-31. The license number of the black Lincoln Navigator was traced by police to the residence of Anthony. ***Id.,*** p. 92. There is no reasonable probability that, had Anthony not testified to his presence at the scene of the shooting, the jury would have harbored a reasonable doubt regarding the identification of Anthony as the driver of the black Lincoln Navigator and his involvement in the shooting of Brown. Anthony has not shown that the law regarding ineffective assistance of counsel was unreasonably applied by the state courts as regards counsel's presentation of the defense of self-defense.

B. Punishment Mitigation

Anthony next alleges that Barrera possessed medical records showing that he suffered a severe head injury when he was struck by a baseball bat at the age of 17 but failed to investigate whether the injury caused organic brain damage. In his affidavit, Barrera testified that the records did not cause him to suspect that Anthony had suffered a brain injury. He stated that the records were only relevant to prove that Anthony reasonably believed that his life would

be in danger if he suffered another head injury. Thus, Barrera did not seek to have the records reviewed by a psychiatrist, psychologist, or other expert.

Counsel has a duty to make a reasonable investigation of defendant's case or make a reasonable decision that a particular investigation is unnecessary. ***Strickland***, 466 U.S. at 691. As support for this claim, a petitioner is required to specify what the investigation would have disclosed ans why it would have been likely to make a difference at trial. ***Anderson v. Collins,*** 18 F.3d 1208, 1221 (5th Cir. 1994). In support of this claim before the state habeas court, Anthony submitted the affidavit of Dr. Cecil R. Reynolds who examined Anthony's medical records and determined that Anthony more likely than not suffers residual organic brain damage as a result of the injury he sustained when he was 17. According to Dr. Reynolds, among the many residual effects of such an injury are lack of impulse control, a tendency towards aggression, and poor emotion regulation. He stated that impulsivity and aggression can be controlled by medication. Dr. Reynolds testified that a competent attorney should have retained an expert to evaluate the medical records. He also believes that the jury existence of such an injury and the possibility of treatment mitigates Anthony's culpability.[1]

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[1]Anthony also states he offered an affidavit from Dr. Daneen Milam who did examine him. However, according to Anthony, the affidavit was submitted with a motion for reconsideration in April 2005, after the state habeas court entered its recommendation on February 10, 2005. Neither the motion nor the affidavit appears in the state habeas records. Because it does not appear that Dr. Milam's affidavit was considered by the state habeas courts in rendering their decision, it cannot be considered

In rejecting the probative value of Dr. Reynolds' opinion, the state habeas court noted that, before Anthony sustained the head injury, he belonged to a street gang, had been committed to a mental health facility for acting out, had abused drugs, may have been involved in gang-related robberies and drive-by shootings, and had been adjudicated delinquent for possession of cocaine as a juvenile. The Court concluded that Dr. Reynolds was not qualified to testify what a competent lawyer would have done, and that his testimony provided without examination, that Anthony suffered an organic brain injury was unpersuasive. The court also stated that Dr. Reynolds' testimony as to the mitigating effect of evidence regarding Anthony's asserted brain injury was speculative. The court also found that evidence that Anthony lacked impulse control and had aggressive tendencies could have resulted in the assessment of a higher sentence.

In the petition before this Court, Anthony notes that impaired intellectual functioning is judicially-recognized as being inherently mitigating. ***Tennard v. Dretke,*** 542 U.S. 274, ___ (2004). He asserts that Barrera possessed medical records "strongly suggesting brain damage." In support of his contention, Anthony cites ***Wiggins v. Smith,*** 539 U.S. 510 (2003), in which the Supreme Court held that the decision of counsel not to expand an investigation of petitioner's life history for mitigating evidence beyond a presentence investigation report and department of social services records constituted ineffective assistance. Anthony also relies upon ***Miller v.***

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here.

Dretke, 420 F.3d 356 (5th Cir. 2005), in which the Fifth Circuit Court of Appeals held that defense counsel was ineffective for failing to present treating physicians' testimony regarding the defendant's medical and psychological problems during the punishment phase of trial.

In ***Miller,*** the defendant was convicted of deadly conduct for firing several shots into a mobile home. Miller's ex-husband testified on behalf of the defense that, in 1994, Miller was hospitalized for several weeks after suffering head injuries in a severe car accident. He stated that as a result of her accident, she suffered from reverse forward amnesia, post-traumatic stress disorder, and severe clinical depression, requiring extensive medication and the care of numerous physicians. He pointed out that before her accident, Miller had been an industrious and responsible worker. Miller testified that she was taking several medications on account of her accident, and was seeing a number of physicians, including a neurologist and some psychiatrists. She stated that she was suffering from a variety of ailments, including memory loss, severe migraine headaches and a "white matter disease" that had to be monitored using "MRI's every so often to see if it's still growing." She asserted that, as a result of her condition, she had no memory of the shooting incident.

In a motion for new trial, which was denied, medical evidence was presented establishing that one of defendant's physicians diagnosed Miller with organic brain syndrome which had been documented on "several very sophisticated neuropsychological tests." Another physician diagnosed PTSD and post-concussion syndrome and noted that patients with

severe PTSD exhibit marked feelings of vulnerability, suffer from depression and high anxiety, and may appear paranoid. According to that physician, testing had revealed that Miller suffered from "cognitive rigidity and poor problem-solving skills which typically are seen in injuries involving the frontal lobe." Miller's attorney admitted he did not prepare much for the punishment phase because he thought that Miller would accept the plea bargain offered of deferred adjudication probation. He conceded that he could have obtained the doctors' letters before the punishment phase of the trial, and stated that in retrospect, he should have interviewed her doctors before trial and called them to testify in mitigation of punishment.

The ***Miller*** Court cited prior decisions holding that a criminal defense attorney has a duty to investigate a client's medical history when it becomes clear that the client is suffering from mental difficulties rendering him insane or incompetent to stand trial. 402 F.3d at 364. The review must focus on whether the information he possessed would have led a reasonable attorney to investigate further. ***Id.*** at 363. In finding that Miller's attorney rendered defective performance, the Court of Appeals noted that he was aware prior to the commencement of the punishment phase of Miller's trial that Miller had suffered mental and emotional injuries as a result of her car accident and was also cognizant of the fact that these injuries comprised mitigating evidence. 402 F.3d at 361. The Court also observed that Miller's lawyer offered no tactical or strategic explanation for his lack of investigation.

The facts in the case before this Court are

distinguishable. Anthony argues that Barrera possessed medical records 'strongly suggesting brain damage." However, while he presented expert medical evidence suggesting that those records indicated organic brain damage, he offered nothing to prove that, by examining the records, a reasonably competent attorney would either reach that conclusion or determine that additional investigation was necessary. The Court agrees with the state habeas court that Dr. Reynolds is not qualified to express the opinion that a competent attorney should have retained an expert to evaluate the medical records. Neither Dr. Reynolds in his affidavit nor Anthony in his argument identifies any findings within Anthony's medical records which would cause a reasonable attorney to suspect he suffers brain damage. Nor did Anthony offer any expert legal evidence proving that findings in his medical records should trigger a further investigation by a reasonable attorney.

As noted in ***Miller,*** a defense attorney has a duty to investigate a client's medical history when it becomes clear that the client is suffering from mental difficulties rendering him insane or incompetent to stand trial. 402 F.3d at 364. Unlike ***Miller,*** no evidence was presented to the state courts indicating that Anthony suffered mental difficulties at any time after he was injured and prior to trial. Nor is there any proof that his behavior deteriorated after his injury or that the injury required extensive medication and the care of numerous physicians. In fact, as noted by respondent, Anthony's behavior, if anything, improved after the injury.

Barrera testified that the records did not cause him to suspect that Anthony had suffered a brain

injury. Unlike the attorney in ***Miller,*** Barrera was not aware prior to the commencement of the punishment phase that Anthony had suffered mental and emotional injuries as a result of his car accident. Nor does the evidence establish that Barrera was cognizant that the alleged injury comprised mitigating evidence. Finally, in ***Wiggins,*** the Supreme Court held that further investigation of the defendant's life history was warranted, particularly in light of the absence of any aggravating factors in his background. 539 U.S. at 525. As will be discussed below, several aggravating factors existed in Anthony's background. Anthony has failed to establish deficient performance.

Anthony also fails to prove that he was prejudiced because expert evidence of organic brain damage was not introduced. In ***Miller,*** the Court of Appeals noted that a petitioner challenging a sentence imposed in a state court proceeding must establish a reasonable probability that but-for attorney error, his sentence would have been significantly less harsh. 402 F.3d at 365. Factors to consider in this analysis are: the actual amount of the sentence imposed on the defendant by the sentencing judge or jury; the minimum and maximum sentences possible under the relevant statute or sentencing guidelines, the relative placement of the sentence actually imposed within that range, and the various relevant mitigating and aggravating factors that were properly considered by the sentencer. ***Id.***

In finding that Miller was prejudiced by her attorney's failure to present medical evidence of her condition, the Court of Appeals found that had the medical evidence been introduced, Miller would have been viewed as a sick woman, and her actions those of

a person debilitated in mind as well as body. 402 F.3d at 366. The Court also believed, as Anthony argues here, that the jury could have inferred that her condition could be improved with consistent therapy, thus building a better case for probation. ***Id.*** at 363. Miller was sentenced in the upper range of the applicable statutory punishment.

Unlike Miller, Anthony engaged in various types of aberrant behavior prior to his injury. Glen Atkinson, a Bexar County juvenile probation officer, testified that he supervised Anthony beginning in 1996 while he was on probation after being adjudicated delinquent for possession of cocaine. **Reporter's Record,** Vol. 7, pp. 15, 19, 22. Anthony told Atkinson that he was an ex-Klan gang member. ***Id.,*** p. 21. Thomas Carson testified that he came into contact with Anthony when Carson worked at the Bexar County Juvenile Justice Academy, a school for juveniles who have been expelled from public school. ***Id.,*** pp. 30-31. Anthony was there fro a year, some time between 1996 and 1998. ***Id.,*** p. 36. Carson observed Anthony lose his temper on two occasions. ***Id.,*** pp. 33-34.

Evidence was also admitted showing Anthony's admission to a psychiatric hospital in 1995. **Reporter's Record,** Vol. 7, p. 42. Anthony advised the nurse he was a member of the Crips gang and had been 'in the car during drive-bys and had been involved in robberies." ***Id.,*** pp. 44-45. He also admitted smoking marijuana and trying "acid, coke and Freon." ***Id.,*** p. 51. A hospital record explaining the reason for admission states: "Runaway, gang involvement, drug usage, isolated from family, physically abusive with seven-year-old brother,

attached his father, [and] stole a gun . . ." *Id.*, p. 52.

Anthony was sentenced in the mid-range of the possible statutory punishment for murder of 5-99 years. Unlike Miller, the evidence does not demonstrate that, after his injury, Anthony was a person debilitated in mind and body. Also unlike Miller, Anthony engaged in various types of criminal behavior and was committed to a mental health facility for violent tendencies prior to his injury.[2] No basis exists for concluding that his actions in shooting Brown on December 30, 2000 were related to his head injury. Because of Anthony's prior aberrant behavior, it is not likely that the jury would have mitigated his sentence based upon testimony that Anthony suffered a brain injury in September 1997 which was susceptible to treatment. It is not reasonably probable that but-for Barrera's failure to investigate the present medical evidence to that effect, Anthony's sentence would have been significantly less harsh. The determination by the state habeas courts that Anthony was not denied the effective assistance of counsel, is not contrary to and did not involve an unreasonable application of clearly-established federal law.

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[2]As Anthony notes, the trial record does not clearly indicate when, between 1996 and 1998, the temper incidents occurred at the Bexar County Juvenile Justice Academy. However, it was his burden to establish prejudice and, thus, his responsibility to show that violent behavior could be related to the injury. He has not done so and does not suggest that he can.

Recommendation

It is, therefore, the recommendation of the Magistrate Judge that Anthony's Section 2254 habeas application be **DENIED.**[3]

Instructions for Service and Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties either by (1) certified mail, return receipt requested, or (2) facsimile if authorization to do so is on file with the Clerk. Pursuant to Title 28 U.S.C. Section 636(b)(1) and Rule 72(b), Fed.R.Civ. P., any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the district court. A party filing objections must specifically identify those findings, conclusions, or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. ***Such party shall file the objections with the Clerk of Court and serve the objections on all other parties and the Magistrate Judge.*** A

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[3]Anthony has requested an evidentiary hearing. However, under the AEDPA, an evidentiary hearing is necessary only where a) the claim relied on a new rule of constitutional law or a factual predicate that could not have been previously discovered through the exercise of due diligence and b) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. ***See*** **28 U.S.C. § 2254(e)(2).** ***Guillory v. Cain,*** 303 F.3d 647, 650 n.5 (5th Cir. 2002). No such circumstances exist here.

party's failure to file written objections to the proposed findings, conclusions, and recommendations contained in this report shall bar the party from a ***de novo*** determination by the district court. ***See Thomas v. Arn,*** 474 U.S. 140, 150 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions, and recommendation contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. ***Douglass v. United Services Automobile Association,*** 79 F.3d 1145, 1428-29 (5th Cir. 1996).

SIGNED Wednesday, October 26, 2006.

/s/

JOHN W. PRIMOMO
United States Magistrate Judge

APPLICANT **RICARDO ANTHONY, JR.**

APPLICATION NO. **61,441-01**

APPLICATION FOR 11.07 WRIT OF HABEAS CORPUS

ACTION TAKEN

APPLICATION DENIED WITHOUT WRITTEN ORDER ON FINDINGS OF TRIAL COURT WITHOUT A HEARING.

/s/ Cheryl Johnson 5/18/05

JUDGE DATE

NO. 2001CR4920-WI

EX PARTE	§	**IN THE DISTRICT COUPT**
RICHARD ANTHONY, JR.	§	**144TH JUDICIAL DISTRICT**
	§	**BEXAR COUNTY, TEXAS**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECO MMENDATIONS ON APPLICATION FOR POST-CONVICTION RELIEF UNDER ART. 11.07

Richard Anthony, Jr., through counsel H. Melissa Mather, has filed an application for post-conviction relief from his conviction and sentence under Cause Number 2001CR4920.

HISTORY OF THE CASE

applicant was convicted by a jury of murder in 2002, and by that jury sentenced to 50 years confinement. An appeal was taken to the Fourth Court of Appeals, which affirmed the conviction and sentence (04-02-00216-CR, March 12, 2003). Discretionary review was denied (#0850-03, September 10, 2003). This is Applicant's first application for post-conviction relief.

ALLEGATIONS OF APPLICANT

1. Applicant asserts that he received ineffective assistance from trial counsel, I that his counsel pursued an irrational strategy of self-defense, irrational because Applicant was unlawfully carrying "an unregistered handgun" at the time.

2. Applicant further asserts that his trial counsel was ineffective for failure to investigate Applicant's background and learn that he has organic brain damage from having been struck in the head with a baseball bat some two years prior to the commission of the instant offense. It is asserted that though such information had no potential of providing a defense it would have served to mitigate Applicant's punishment.

FINDINGS OF FACT

1. Records provided by trial counsel, who obtained the records prior to Applicant's trial, demonstrate that Applicant had in fact been beaten up and perhaps struck in the front of the head with a baseball bat a couple of years before the murder, resulting in an epidural hematoma. Trial counsel, by virtue of these records, was well aware of Applicant's history of having had a head injury. In fact, he made reference to his client's history of having sustained a serious head injury. In fact, he made reference to his client's history of having sustained a serious head injury in his opening statement to the jury. He makes affidavit that, in his opinion, the highest and best use of that information was to demonstrate to the trial jury the reasonableness of the defendant's fear of possible head injury at the hands of the much large deceased.
2. Trial counsel avers, again by affidavit, that he was well aware of the provisions of Section 9.31(b)(5)(A) when he undertook to represent Applicant. Trial counsel has been one of Bexar County's leading criminal attorneys for some 50

years, and was board certified in criminal law with the first group of lawyers so certified by the Texas Board of Legal Specialization in 1975. It is frankly inconceivable that he would have been unaware of that aspect of our law. Further, the record reflects that the issue was discussed repeatedly during jury selection. Reporter's Record, Vol. 2, Pages 56, 60, 98, 101, 102, 142 and seriatim. Counsel was aware of the law.

3. Applicant's vehicle was seen to drive up by the deceased's vehicle, witnesses heard two shots fired, and two witnesses observed Applicant driving away from the shooting, in a rapid manner. Applicant immediately fled to Mexico and did not return until persuaded to do so by his family and his attorney. Thus, though there was no eyewitness to the actual shooting, the circumstantial case against Applicant was very strong. It is apparent that the only conceivable defense was self-defense, however limited.

4. According to Applicant's testimony, the other vehicle has struck his vehicle and driven off. He pursued to get identifying information from the other driver (this point was argued to the jury, as against a claim of seeking out the deceased to straighten out "differences" between them, by defense counsel at RR. Vol. 6 Page 117, line 14). When he got out to talk with the other driver, he testified, the other driver came at him in an aggressive manner, threatening, he believed, to beat Applicant, and with something unidentified in his hand. In view of his prior head injury, he asserted, he was afraid that an

assault by the deceased would result in Applicant sustaining serious bodily injury or death. To prevent that eventuality, he withdrew his weapon from the glove compartment and fired twice. He hit the deceased only once, in the groin, but the injury proved to be lethal.

5. It appears Applicant was in fact unlawfully carrying a weapon at the time of the murder, not because the handgun was "unregistered" but because Applicant, so far as appears, was not licensed to carry a handgun under Chapter 411, Subchapter H, Government Code.

6. Evidence presented at the punishment phase indicated that Applicant had belonged to a street gang, had been committed to a mental health facility for acting out, had abused drugs and may have been (by his own statement to a counselor) involved in one or more robberies or drive-by shootings committed by his gang and was adjudicated delinquent for possession of cocaine as a juvenile, all before he received his head injury at age 17.

7. The opinion of a psychologist, however, thick his curriculum vitae, that a person whom he has never examined "more likely than not suffers resi[illegible]l brain damage from the severe injury he sustained in September, 1997" is unpersuasive: moreover, his opinion as to what a competent lawyer would have done with the medical information available to trial counsel is clearly beyond his expertise. It not being established that his suspicions are fact, it is speculation of the highest order that an undisclosed expert

could have offered medical evidence that would have mitigated punishment in the case. Indeed, if the jury had been informed (more than this jury, which was told of the injury, was) that Applicant lacked impulse control, had a tendency towards aggression and poor emotion regulation it might very well have assessed a greater, and lot a lesser sentence.

CONCLUSIONS OF LAW

1. The limitation on the right of self-defense provided by Section 9.31(b)(5)(A) was rather clearly made a part of the penal code for the purpose of overcoming the older self-defense cases on the books, holding that a defendant who, having suffered an affront, went and armed himself before seeking an explanation did not thereby lose the right of self-defense. *See, e.g., McCleary v. State,* 122 S.W.26 (Tex. Crim. App. 1909); *Brown v. State,* 213 S.W. 658 (Tex. Crim. App. 1919), *Proter v. State,* 215 S.W.2d 889 (Tex. Crim. App. 1949), *Banks v. State,* 656 S.W.2d 446 (Tex. Crim. App. 1983). This Applicant, by his own testimony, was confronted with a situation in which he and the deceased, having been involved in a traffic accident resulting in property damage, were obliged by Section 550.022, Transportation Code, to stop and exchange relevant information. Applicant did not go and arm himself to seek an explanation–the weapon was already in the vehicle, where he had placed it perhaps a year earlier. It was a highly debatable fact question whether (in the language of the statute) his conduct constituted

"s(eeking) an explanation from or discussion with the other person concerning the actor's differences with the other person."

Is a person who is unlawfully carrying a weapon excused from the duties imposed by Section 550.022, Transportation Code? Clearly, he is not. If, when he stops in compliance with the Transportation Code, he is confronted with a violent other driver who intends to cause him great bodily harm or death, is he precluded from using his weapon in self-defense? It would seem not. "The right of self-defense is founded on the law of nature, and is not, nor can be, superseded by any law of society." *West v. State,* 2 Cr. R. 460 (Tex. Crim. App. 1877).

Applicant's present counsel seems to assert that–as a matter of law–he had no right of self-defense, hence trial counsel's reliance on self-defense was, she says, irrational.[1] As a matter of fact, however, case law is to the effect that whether a person acted in self-defense is a question of fact. *See, e.g. Jenkins v. State,* 740 S.W.2d 435 (Tex. Crim. App. 1983). Competent counsel might very rationally believe that if the jury felt his client's conduct in killing the deceased was factually and morally justified, and particularly if they believed his testimony that his purpose was merely to exchange insurance information, they would find the defendant not guilty in spite of the fact that he was unlawfully carrying a weapon at the time.

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[1]It is hardly to be expected that, if a new trial were granted, counsel's position at trial would be the same.

Applicant's present circumstance is not a product of an irrational approach by his trial attorney, it is the result, simply, of the jury not believing his testimony.

2. Applicant and his trial counsel had no other option than to pursue a defensive theory of self-defense or to plead guilty. Once the decision was made not to plead guilty, trial counsel thus pursued the only avenue of defense which had any viability whatsoever. Once the history of a head injury had been used to attempt to convince the jury that Applicant acted in self-defense and the jury had found against him, psychological evidence that he might be able to control his behavior in the future through medication might or might not have been mitigatory. The one thing the jury would hear from such a witness that was solid and concrete was that the Applicant had serious behavioral problems. Whether a jury would take comfort in the fact that the behavior might be modifiable in the future and mitigate Applicant's punishment for that reason is sheer speculation. Moreover, there was a great deal of other, very damaging evidence, admitted against Applicant at the punishment phase, all involving misconduct by hm antedating the head injury. At the very least, a strategy of relying upon self-defense was at least as rational as pleading guilty and hoping for largesse from the jury based upon psychological testimony that may or may not have been available.

RECOMMENDATION AND ORDERS

There being no controverted, previously unresolved facts which are material to the legality of Applicant's confinement, it is respectfully recommended that relief be denied.

The Clerk of the Court will forward the Application and its attachments, any responses of the State and this Order to the Court of Criminal Appeals and will also provide copies of the order to each of the following:

Susan Reed, Criminal District Attorney
Bexar County Justice Center
San Antonio, Texas 78205

H. Melissa Mather, Attorney at Law
823 Congress Ave, Suite 200
Austin, Texas 78701

RECOMMENDED, ORDERED AND SIGNED this 10th day of February, 2005.

/s/

Mark R. Luitjen, Judge
144th District Court
Bexar County, Texas

STATE OF TEXAS)
)
) s.s.:
COUNTY OF BEXAR)

ROY BARRERA, being duly sworn, deposes and says:

1. My name is Roy Barrera, Sr. I am an attorney licensed in the State of Texas since May 24, 1951. I acted as trial counsel to Richard Anthony, Jr. in Cause No. 2001-CR-4920, in the 144th Judicial District Court of Bexar County, Texas.

2. From my initial review of the facts until the time of trial, I approached Mr. Anthony's case as one of self-defense. At the time of Mr. Anthony's trial, I was aware of the provisions of Tex. Penal Code 9.31, limiting the availability of a claim of self-defense when an unregistered handgun is involved in the sue of force. I believed that if the jury believed Mr. Anthony when he said that he thought his life was in danger from the victim, Samuel Brown, they would acquit him of the charge of murder.

3. The records attached to this affidavit, from the Southwest Texas Methodist Hospital in San Antonio, Texas, are true and correct copies of records I collected in preparing for this case. I did not seek to have these records examined by a psychiatrist or psychologist or any other expert. To me, these records represented objective evidence of Mr. Anthony's reasonable belief that his life would be in danger if he were to suffer an additional head injury. My review of these records did not cause me to suspect that Mr. Anthony might suffer from a brain injury.

/s/
ROY BARRERA, SR.

Sworn to before me this
6th roday of December 2004.

/s/
Notary Public

Linda Sue Guajardo
Notary Public
State of Texas
My Comm. Exp. 08-30-2005